DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 09-1163
Title: Glen Scott Milner, Petitioner
v.
Department of the Navy
Docketed: March 26, 2010
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (07-36056)
Decision Date: August 5, 2009
Rehearing Denied: December 22, 2009
Questions Presented

---Date---	-------Proceedings and Orders---------------------
Mar 22 2010	Petition for a writ of certiorari filed. (Response due April 26, 2010)
Apr 21 2010	Order extending time to file response to petition to and including May 26, 2010.
May 25 2010	Order further extending time to file response to petition to and including May 28, 2010.
May 28 2010	Brief of respondent Department of the Navy in opposition filed.
Jun 8 2010	DISTRIBUTED for Conference of June 24, 2010.
Jun 28 2010	Petition GRANTED.
Jul 16 2010	The time within which to file the joint appendix and petitioner's brief on the merits is extended to and including August 31, 2010.
Jul 16 2010	The time within which to file respondent's brief on the merits is extended to and including October 8, 2010.
Aug 31 2010	Joint appendix filed. (Statement of costs filed)
Aug 31 2010	Brief of petitioner Glen Scott Milner filed.
Sep 7 2010	SET FOR ARGUMENT ON Wednesday, December 1, 2010.
Sep 7 2010	Brief amici curiae of Reporters Committee for Freedom of the Press, et al. filed.
Sep 7 2010	Brief amici curiae of Public Citizen, et al. filed.
Sep 7 2010	Brief amici curiae of Allied Daily Newspapers of Washington, et al. filed.
Sep 14 2010	CIRCULATED.
Sep 22 2010	Record received fro U.S.D.C. for Western District of Washington. (1 envelope)
Sep 24 2010	Record received from U.S.C.A. for 9th Circuit. (1 envelope)
Sep 30 2010	The time within which to file respondent's brief on the merits is further extended to and including October 15, 2010.
Oct 15 2010	Brief of respondent Department of the Navy filed. (Distributed)
Nov 15 2010	Reply of petitioner Glen Scott Milner filed. (Distributed)
Dec 1 2010	Argued. For petitioner: David S. Mann, Seattle, Wash. For respondent: Anthony A. Yang, Assistant to the Solicitor General, Department of Justice, Washington, D. C.
Dec 9 2010	Letter of the Acting Solicitor General filed. (Distributed)

PETITION
FOR
WRIT OF
CERTIORARI

FILED

No. ______ 091163 MAR 22 2010

OFFICE OF THE CLERK

In The
Supreme Court of the United States

GLEN SCOTT MILNER,

Petitioner,

v.

UNITED STATES DEPARTMENT OF THE NAVY,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether 5 U.S.C. § 552(b)(2), which allows a government agency to keep secret only documents related solely to the internal personnel rules and practices of an agency, must be strictly construed to preclude the "High 2" expansion created by some circuits but rejected by others.

PARTIES TO THE PROCEEDINGS

Petitioner Glen Milner is an individual and United States citizen who initiated the proceedings below by filing a complaint under the Freedom of Information Act against respondent United States Navy in the Western District of Washington. The District Court granted the Navy's motion for summary judgment and dismissed the case. Petitioner Milner appealed the District Court's determination to the Ninth Circuit Court of Appeals, which affirmed the District Court's grant of summary judgment. No petitioner is a publicly owned corporation.

Table of Contents

Page

I. INTRODUCTION AND STATEMENT OF FACTS 1

II. ARGUMENT 5

  A. Review is Necessary to Resolve an Important Question of Federal Law 5

    1. Strict construction of FOIA mandates that Congress, not the courts, decide whether to broaden Exemption 2. 5

  B. Review is Necessary to Resolve a Conflict between the Circuits. 22

III. CONCLUSION 31

APPENDICES:

1. 5 U.S.C. sect. 552(b) .... App. 1

2. Order in U.S. District Court, Western Washington District No. CV-06-01301-JCC (Oct. 30, 2007). .... App. 4

3. Opinion in Ninth Circuit Court of Appeals No. 07-36056 (Aug. 5, 2009). .... App. 26

4. Order in Ninth Circuit Court of Appeals No. 07-36056, denying en banc rehearing (Dec. 22, 2009). .... App. 65

Table of Authorities

Page

Cases

Abraham & Rose, P.L.C. v. United States,
138 F.3d 1075 (6th Cir. 1998) 23

Audubon Soc'y v. U.S. Forest Svc.,
104 F.3d 1201 (10th Cir. 1997) 24

Caplan v. Bureau of Alcohol, Tobacco & Firearms,
587 F.2d 544 (2d Cir. 1978) 24

Cox v. Levi,
592 F.2d 460 (8th Cir. 1979) 23, 26

Crooker v. Bureau of Alcohol, Tobacco & Firearms,
670 F.2d 1051 (D.C. Cir. 1981) ....passim

Dep't of the Air Force v. Rose,
425 U.S. 352, 96 S. Ct. 1592 (1976) ....passim

Dirksen v. Dep't of Health and Human Services,
803 F.2d 1456 (9th Cir. 1986) 14, 28

Environmental Protection Agency v. Mink,
410 U.S. 73, 93 S. Ct. 827 (1973) 7

Gordon v. FBI,
388 F.Supp.2d 1028 (N.D. Cal. 2005) 19

Hardy v. Bureau of Alcohol, Tobacco, and Firearms,
631 F.2d 653 (9th Cir. 1980) 28

Hawkes v. Internal Revenue Svc.,
467 F.2d 787 (6th Cir. 1972) 22, 23, 26

James Madison Project v. CIA,
605 F.Supp.2d 99 (D.D.C. 2009) 13

Jordan v. U.S. Dep't of Justice,
591 F.2d 753 (D.C. Cir. 1978) 25

Kaganove v. Environmental Protection Agency,
856 F.2d 884 (7th Cir. 1988) 18, 19, 28

Kuehnert v. FBI,
620 F.2d 662 (8th Cir. 1980) 23

L.A. Times v. Dep't of the Army,
442 F.Supp.2d 880 (C.D. Cal. 2006) 13

Lahr v. NTSB,
569 F.3d 964 (9th Cir. 2009) 7

Maricopa Audubon Soc'y v. U.S. Forest Svc.,
108 F.3d 1082 (9th Cir. 1997) 28, 29

Milner v. U.S. Navy,
575 F.3d 959 (9th Cir. 2009) ....passim

National Archives and Records Admin. v. Favish,
541 U.S. 157, 124 S. Ct. 1570 (2004) 19

National Treasury Employees Union v. U.S. Customs Svc.,
802 F.2d 525 (D.C. Cir. 1986) 15, 17, 18

NLRB v. Robbins Tire & Rubber Co.,
437 U.S. 214, 98 S. Ct. 2311 (1978) 6

PHE, Inc. v. U.S. Dep't of Justice,
983 F.2d 248 (D.C. Cir. 1993) 19

Rugiero v. U.S. Dep't of Justice,
257 F.3d 534 (6th Cir. 2001) 23

Sladek v. Bensinger,
605 F.2d 899 (5th Cir. 1979) 24

Stokes v. Brennan,
476 F.2d 699 (5th Cir. 1973) 23

Vaughn v. Rosen,
523 F.2d 1136 (D.C. Cir. 1975) 25

Statutes

5 U.S.C. § 552(b)(1) 18

5 U.S.C. § 552(b)(2) 1, 4, 7, 10

5 U.S.C. § 552(b)(2)(7) 18

5 U.S.C. § 552(b)(3) 18

5 U.S.C. § 552(b)(7) 19

Other Authorities

H.R.Rep. No. 1497, 89th Cong., 2d Sess. 10 (1965) .. 10

S.Rep. No. 813, 89th Cong., 1st Sess. 8 (1965)............ 9

United States Dep't of Justice, *Guide to the Freedom of Information Act* (June 2009).......................... 14, 19

PETITION FOR A WRIT OF CERTIORARI

Petitioner Glen Milner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

DECISIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit, published as *Milner v. U.S. Dept. of the Navy*, 575 F.3d 959 (9th Cir. 2009), is reprinted in the Appendix (App.) at 26. The decision of the United States District Court for the Western District of Washington, reprinted at App. 4, is not published but is available as *Milner v. U.S. Dept. of the Navy*, 2007 WL 3228049 (W.D.Wash. 2007).

JURISDICTION

Petitioner Milner's motion for reconsideration en banc was denied by the Court of Appeals by order entered on December 22, 2009. This Court has jurisdiction under 28 U.S.C. § 1254 (1).

STATUTORY PROVISIONS

5 U.S.C. § 552(b) of the Freedom of Information Act ("Exemption 2") provides in pertinent part:

> (b) This section [providing for public access to government documents] does not apply to matters that are:
>
> . . .
>
> (2) related solely to the internal personnel rules and practices of an agency;

I. INTRODUCTION AND STATEMENT OF FACTS

Exemption 2 of the Freedom of Information Act allows a government agency to withhold material "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2). In 1976, this Court ruled that Exemption 2 allowed an agency to keep from disclosure trivial materials in which the public did not have any legitimate interest. *Dep't of the Air Force v. Rose*, 425 U.S. 352, 96 S. Ct. 1592 (1976). Left open was the question of whether Exemption 2 also covered nontrivial materials, the release of which might risk circumvention of agency regulation. *Dep't of the Air Force v. Rose*, 425 U.S. at 369, 96 S. Ct. at 1603 (1976).

Despite the plain language of the Exemption, some circuits have created a "High 2" reading of Exemption 2. The parameters of this judicially-created expansion of the exemption vary. In this decision, the Ninth Circuit ruled that a government agency could keep secret any document that is "predominantly internal and its disclosure presents a risk of circumvention of agency regulation." *Milner v. U.S. Navy*, 575 F.3d 959, 968 (9th Cir. 2009). Some circuits agree with this reading; others have varying tests for High 2. Still other circuits limit the Exemption to the "Low 2" trivial administrative materials this Court described in *Rose*. This judicially-created High 2 reading of Exemption 2 is a significant departure from the plain language of the Exemption, and represents a departure even from the hypothetical left open in *Rose*. Appellant Glen Scott Milner asks this court to revisit the question left open thirty years ago, and resolve a split between the circuits in favor of the plain language of the Exemption and disclosure, rather than a judicially-created reading sanctioning government secrecy.

Appellant Milner is a citizen who wants to know if he is at risk from ammunition stored at the U.S. Navy's Naval Magazine Indian Island (NMII). NMII is an ammunition depot located very near the civilian communities of Port Hadlock and Port Townsend in the Puget Sound area of Washington. It is located on a small island, connected to the mainland via a public road. The Navy does not hide the presence of NMII, nor does it deny that explosives are stored there.

The Navy has calculated how far an explosion would go if a fire or accident occurred at NMII. The Navy creates and maintains Explosive Safety Quantity Distance (ESQD) data for explosives storage facilities. An ESQD is the distance an explosion is expected to expand should a particular explosive or combination of explosives detonate. ESQD data is used by the Navy for construction purposes, and is regularly released to civilian construction crews. It is used by local fire and other safety agencies in planning for emergencies. A previous version of the exact information sought here – an ESQD map showing the blast radius of the items stored in buildings at NMII – was provided to local emergency response personnel and elected officials, and then published in a local newspaper. Appellant Milner, and other citizens, could use the information if released to make informed decisions about whether they wanted to live within a blast radius, or drive, walk, or boat through the risk arcs when travelling near NMII. Should a fire break out, publication of the explosive arcs in advance would mean that civilians would know how far away they must stay.[1] These maps also have an important political use. NMII is very near civilian communities; these communities should know whether NMII poses a risk to their safety, so that they may exercise their democratic rights to protest that risk.

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[1] The risk of a disaster is not abstract. On October 28, 2009, Port Chicago National Magazine Memorial became the Nation's newest national park site. Port Chicago was the site of a 1944 explosion that killed 320 people at a naval magazine much like NMII.

Appellant Milner has obtained, through FOIA requests, ESQD maps from the Navy showing the blast radius of explosives stored at nearby Bangor submarine base – a facility that, unlike NMII, also stores nuclear weapons. Inexplicably, the commander of NMII denied Mr. Milner's FOIA request for its maps, claiming in a declaration that he believed release of the maps to Mr. Milner "would do little or nothing to promote the purpose of democratic oversight which is at the heart of the Freedom of Information Act." ER 0075; 77.

Mr. Milner brought suit under FOIA, and the District Court affirmed the Navy's denial, relying exclusively on the "High 2" reading of 5 U.S.C. § 552(b)(2). In a 2-1 split, a panel of the Ninth Circuit affirmed the District Court's decision, and dramatically expanded the reach of Exemption 2 beyond even other circuits that have created a High 2 reading. The Ninth Circuit's decision allows an agency to keep from disclosure any document "if it is predominantly internal and its disclosure presents a risk of circumvention of agency regulation." *Milner v. U.S. Navy*, 575 F.3d 959, 968 (9th Cir. 2009). The *Milner* court expanded the scope of High 2 as adopted by the D.C. Circuit and previous Ninth Circuit decisions by allowing the Navy to assert a risk from any person, rather than limiting the exemption to risks presented by the subjects of agency regulation. The Ninth Circuit further abandoned any pretext of reliance on a specific law or regulation, instead allowing the Navy to rely on hypothetical general safety concerns.

Glen Milner asks this Court to decide the question left open in 1976 in favor of disclosure rather than secrecy, resolve the split among circuits regarding the existence and scope of a "High 2" exemption, reject the judicial creation of an exemption that goes beyond the statute, and hold that Exemption 2 is limited to trivial administrative materials, and is not a catch-all for any information a government agency speculates may risk harm to agency operations.

II. ARGUMENT

A. Review is Necessary to Resolve an Important Question of Federal Law.

1. Strict construction of FOIA mandates that Congress, not the

courts, decide whether to broaden Exemption 2.

The High 2 reading of Exemption 2 was created by the courts, not Congress, and goes far beyond the exemption's plain language of protecting government from having to release purely administrative matters. This Court's guidelines suggest review of a decision the resolution of which would resolve an important question of federal law. Sup. Ct. R. 10(c). The purpose of FOIA "is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242, 98 S. Ct. 2311, 2327 (1978). FOIA reflects "a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." *Dep't of the Air Force v. Rose,* 425 U.S. at 360-61, 96 S. Ct. 1592 (quoting S.Rep. No. 813-89, at 3 (1965)).

As this Court has noted, FOIA's exemptions were "explicitly made exclusive, and are plainly intended to set up concrete, workable standards for determining whether particular material may be withheld or must be disclosed." *Environmental Protection Agency v. Mink*, 410 U.S. 73, 79, 93 S. Ct.

827, 832 (1973). The delineated exemptions "are to be interpreted narrowly." *Lahr v. NTSB,* 569 F.3d 964, 973 (9th Cir. 2009) (internal citation omitted). The narrow wording of each exemption was explicitly designed by Congress to counteract the "vague phrases, such as that exemption from disclosure any function of the United States requiring secrecy in the public interest" of FOIA's predecessor. *Mink*, 410 U.S. at 79, 93 S. Ct. at 832.

In *Department of the Air Force v. Rose, supra*, this Court considered Exemption 2 in the context of a request for disciplinary records of Air Force cadets. 5 U.S.C. § 552(b)(2) provides that an agency may exempt from disclosure under the Freedom of Information Act only records that are "related solely to the internal personnel rules and practices of an agency." In *Rose*, the Court ordered that Air Force disciplinary records be released to a law review author, holding that Exemption 2 allowed an agency to keep secret trivial matters, but that FOIA mandated disclosure of matters of genuine public interest. *Dep't of the Air Force v. Rose,* 425 U.S. at 364, 96 S. Ct. at 1600. The Court declined to decide the issue of whether Exemption 2 might also allow some materials of genuine public interest to remain secret, noting that courts:

> [P]ermitting agency withholding of matters of some public interest, have done so only where necessary to prevent the circumvention of agency regulations that might result from disclosure to the subjects of regulation of the procedural manuals and guidelines used by the agency in discharging its regulatory function. Moreover, the legislative history indicates that this was the primary concern of the committee drafting the House Report. We need not consider in this case the applicability of Exemption 2 in such circumstances, however, because, as the Court of Appeals recognized, this is not a case "where knowledge of administrative procedures might help outsiders to circumvent regulations or standards."

Dep't of the Air Force v. Rose, 425 U.S. at 364, 96 S. Ct. at 1600 (internal citations omitted). As the Ninth Circuit recognized in this decision, this Court has left open the scope of Exemption 2 since *Rose* was decided in 1976. *Milner v. U.S. Navy*, 575 F.3d 959, 964 n. 2 (9th Cir. 2009).

In holding that Exemption 2 covered trivial materials but leaving open the question of whether the exemption might have a broader reach, this Court noted that the legislative record reflected a split between the Senate and the House on the scope of the exemption. In enacting Exemption 2, the Senate noted that:

> Exemption No. 2 relates only to the internal personnel rules and practices of an agency. Examples of these may be rules as to personnel's use of parking facilities or regulation of lunch hours, statements of policy as to sick leave, and the like.

S.Rep. No. 813, 89th Cong., 1st Sess. 8 (1965), as quoted in *Rose*, 425 U.S. at 363. The House Report provides that Exemption 2 was to be applied to:

> Matters related solely to the internal personnel rules and practices of any agency: Operating rules, guidelines, and manuals of procedure for Government investigators or examiners would be exempt from disclosure, but this exemption would not cover all

> "matters of internal management" such as employee relations and working conditions and routine administrative procedures which are withheld under present law.

H.R.Rep. No. 1497, 89th Cong., 2d Sess. 10 (1965), as quoted in *Rose*, 425 U.S. at 363. As this Court has noted, the Senate Report is the more authoritative. *Rose*, 425 U.S. at 366-67. But the presence of two competing versions of what Exemption 2 means in the legislative record has led to discord among the circuits, and an ever-broadening definition of Exemption 2 that threatens in some circuits to swallow FOIA itself. Resolution of the debate is long-due.

In adopting a High 2 reading of Exemption 2, courts have broadened the phrase "related solely to the internal personnel rules and practices of an agency," 5 U.S.C. § 552(b)(2), to mean any document that is "predominantly internal and its disclosure presents a risk of circumvention of agency regulation." *Milner v. U.S. Navy*, 575 F.3d at 968. As described below, the Ninth Circuit in this matter is not the only circuit to have gone down the dangerous path of expanding Exemption 2; the Ninth Circuit's decision represents the capstone of a long process of judicial expansion of Congress' narrow wording in some circuits. Although lip service is still paid by most courts to the word "personnel," in this case the Ninth Circuit has sanctioned nondisclosure of a map showing how far an explosion will go, regardless of its complete lack of application to any personnel issues other than that it was used by government employees. This creates the vague and undefined exemption FOIA was enacted to eliminate. The Ninth Circuit's decision allows a government agent to keep secret any document, as long as it was not designed for public release nor widely released, and can be shown to create any level of risk to any type of agency operation.

The failure to adhere to FOIA's plain language has far-reaching implications. The slippery slope of the High 2 exemption is patent. There is little data that does not have some potential impact on an agency's operation, and could thus be used to help a potential wrongdoer interfere with an agency's regulations or the law. The hours of the Navy museum gift shop indicate when it is supervised and therefore the best time to burglarize it. How much the Navy pays for baked beans could allow triangulation of price to the supplier, and increase the risk of poisoning. High 2, as the decision of the

Ninth Circuit in this matter has interpreted it, means that anything that is not designed by the agency for public disclosure can be kept secret if the agency can come up with a creative reason explaining why a rule might be circumvented if data is released. But FOIA was designed to take this very discretion away from agencies. The broad reading of Exemption 2 adopted by the Ninth Circuit leads to exactly the unbridled and illogical discretion demonstrated by the Navy in this case: one agency employee, the commander at Bangor submarine base, where nuclear weapons are maintained, decided to release ESQD maps. A different agency commander, at NMII, weighed what he believed were the political benefits to releasing the maps, decided that release "would do little or nothing to promote the purpose of democratic oversight which is at the heart of the Freedom of Information Act," and kept them secret. Allowing Exemption 2 to expand as far as the Ninth Circuit has done in this case sends the message to agency employees that the bad old days of the Administrative Procedure Act have returned, and that they have sole discretion to decide what the public can know about government operations.

The "mosaic approach" to High 2 adopted by some district courts exacerbates the discretion afforded to government agents to decide which documents the public may see. Under the "mosaic approach," government agents can withhold documents that are not intrinsically likely to cause circumvention of agency regulation, but if combined with similar documents might create such a risk. *L.A. Times v. Dep't of the Army*, 442 F.Supp.2d 880, 900-01 (C.D. Cal. 2006) (Allowing withholding of the names of private security contractors, on a theory that these names could be used with data from incident reports to target companies working on the Iraq reconstruction); *see also James Madison Project v. CIA*, 605 F.Supp.2d 99, 111-12 (D.D.C. 2009) (Authorizing withholding of seemingly "harmless" CIA training materials on a fear that foreign intelligence services might employ a mosaic approach with undescribed other data to cause harm).

The problem of unregulated discretion is substantial. The vast majority of FOIA requests are resolved by government agents without any judicial oversight; only a very small percentage of FOIA cases are ever litigated in court. In fiscal year 2008, the Navy alone received 14,405 FOIA requests.[2] Other agencies received thousands more, but reported decisions on FOIA matters are relatively sparse, and several circuits have never addressed whether High 2 exists. Significantly, in providing guidance to Federal agencies, the Department of Justice has emphasized the D.C. Circuit's version of High 2 set forth in *Crooker v. Bureau of Alcohol, Tobacco & Firearms,* 670 F.2d 1051, 1062 (D.C. Cir. 1981), while failing to adequately acknowledge that other circuits have either not addressed the issue, or disagree with it. *See* United States Dep't of Justice, *Guide to the Freedom of Information Act* (June 2009) at 184-85.

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[2] http://www.foia.navy.mil/foia/2008FinalReportl.pdf.

Judicially created limits on High 2 have failed to limit High 2's reach. This Court's comment that it is undecided whether Exemption 2 may include documents the release of which might risk "circumvention of agency regulation" has been used to steadily expand increasing secrecy in a manner that frustrates both the language and intent of FOIA. *Dep't of the Air Force v. Rose,* 425 U.S. at 364, 96 S. Ct. at 1600. Initially applied only to law enforcement documents in cases such as *Crooker v. Bureau of Alcohol, Tobacco & Firearms,* 670 F.2d 1051, High 2 next expanded to administrative regulations, *Dirksen v. Dep't of Health and Human Services,* 803 F.2d 1456 (9th Cir. 1986), then to any document the release of which would render the document "operationally useless" and documents the release of which might give some entity a competitive advantage, *National Treasury Employees Union v. U.S. Customs Svc.*, 802 F.2d 525, 529-31 (D.C. Cir. 1986), and now to the instant case wherein a hypothetical security risk from a hypothetical lawbreaker to a non-regulatory agency is sufficient to trigger Exemption 2's protection.

The D.C. Circuit has attempted to limit the reach of High 2 by adding the word "significantly" to the risk of circumvention requirement. *Crooker*, 670 F.2d at 1074. This effort to restrain misuse of Exemption 2 has been unsuccessful, even within the D.C. Circuit. This "significantly risks" test also appears to have been later abandoned by the D.C. Circuit, and either abandoned or never adopted by the Ninth Circuit. In *National Treasury Employees Union v. U.S. Customs Svc.*, 802 F.2d 525 (D.C. Cir. 1986), the D.C. Circuit allowed the Customs Service to keep secret the criteria for promoting employees, claiming that release might make it "more difficult correctly to evaluate job candidates" based on the court's speculation that some candidates might be advantaged by having access to the criteria while other candidates without access would be unable to prepare to the same level, or that candidates might artificially inflate some areas of their resumes if they knew what criteria would be applied. The Ninth Circuit in this matter accepted a naval commander's declaration that it was possible to reverse-engineer ESQD to identify the locations where the most explosives were stored, without any discussion of the possibility that such a reverse-engineering would take place, or whether it was practically possible to use the information in such a manner.[3]

Moreover, as the dissent in this matter notes, the requirement that an agency must identify a risk from the subjects of agency regulation has been abandoned by the Ninth Circuit. *Milner v. U.S. Dept. of the Navy,* 575 F.3d at 977-78. Under the Ninth Circuit's version, any hypothetical risk is enough to allow nondisclosure. In this case, the Navy asserts that a lawbreaker might "reverse-engineer" the maps to be able to discern which buildings store the most explosives. Carrying the Navy's reasoning not much further, a hypothetical report disclosing corruption in a government agency's purchasing decisions could be kept secret, because it could theoretically be used to discern and exploit purchasing guidelines for commercial gain. Creative minds can always find ways to misuse information; creative government agency minds can now use any hypothetical misuse of data to keep secret virtually anything and everything they want to keep from the public eye.

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[3] It is extremely unlikely that even being able to reverse-engineer the maps would aid a lawbreaker – the record demonstrated that the Navy constantly moves ammunition and explosives around the facility, while the maps are "snapshots" of a particular moment in time – useful for gauging the general risk to the area as a whole should a disaster happen, but no more useful to pinpoint the most explosives at any particular moment than just picking one of the ammunition storage buildings at random, or waiting for a ship to dock and then targeting the transfer wharf. ER 0076.

Disturbingly, the D.C. Circuit has also suggested that the correct inquiry under both Low 2 and High 2 is whether the requested material is the subject of legitimate public interest. *Crooker*, 670 F.2d at 1065. Although the *Crooker* court disclaimed the impact of this proposed inquiry test by noting that it was "not for courts to decide what matters are of legitimate public interest," *id.* at 1065-66, later decisions return to the theme. In *National Treasury Employees Union*, the D.C. Circuit quoted *Crooker's* "lack of public interest" standard to hold that "the appointments of individual members of the lower federal bureaucracy is primarily a question of "internal" significance for the agencies involved," even while acknowledging that "appointment decisions, like any government activity, have some impact upon the public[.]" *National Treasury Employees Union v. U.S. Customs Svc.*, 802 F.2d at

531. While this is the correct inquiry under Low 2 because a matter is trivial only if there is no legitimate public interest, High 2 purports to allow agencies to decide whether there is a public interest in disclosure of admittedly nontrivial documents. This weighing of the democratic merit of a request for information on the part of government bureaucrats is what FOIA was designed to prevent – it is for the citizens, not government employees, to decide what is important to view.

The High 2 reading of Exemption 2 is unnecessary to protect the interests of government, given the protections afforded by other exemptions. Other FOIA exemptions protect the national security interest tenuously asserted by the Navy here. Exemption 1 allows the Navy to protect any document it believes will endanger our nation's defense by classifying it. 5 U.S.C. § 552(b)(1). Similarly, Exemption 3 protects documents that are exempt from disclosure by statute. 5 U.S.C. § 552(b)(3). Moreover, law enforcement materials, the protection of which many of the circuits adopting the High 2 reading of Exemption 2 have relied upon to justify the expansion, are also protected by Exemption 7. 5 U.S.C. § 552(b)(2)(7); *Kaganove v. Environmental Protection Agency*, 856 F.2d 884, 888-89 (7th Cir. 1988); *PHE, Inc. v. U.S. Dep't of Justice*, 983 F.2d 248, 251 (D.C. Cir. 1993). *See also* United States Dep't of Justice, *Guide to the Freedom of Information Act,* p. 203 ("there is a great deal of overlap between the coverage of "high 2" and Exemption 7(E).").

Crucially, unlike other exemptions protecting safety or operations, Exemption 2 contains no safeguards or balancing tests beyond the bare assertion that there is a risk of harm. In *Crooker*, the D.C. Circuit noted that "[i]t is not up to this court to balance the public interest in disclosure against any reason for avoiding disclosure." *Crooker*, 670 F.2d at 1074; *see also Gordon v. FBI*, 388 F.Supp.2d 1028, 1036-37 (N.D. Cal. 2005).[4]

Other exemptions contain balancing. Exemption 7 expressly requires balancing. 5 U.S.C. § 552(b)(7); *National Archives and Records Admin. v. Favish*, 541 U.S. 157, 171, 124 S. Ct. 1570, 1580 (2004). Exemptions 1 and 3 require decisions from either the Executive or Congress, and are inherently balanced by the political process as well as by judicial review of the Executive Order or statute in question. But with the High 2 interpretation of

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[4] The Seventh Circuit has held that "the purpose of the document must be legitimate and the document must not constitute 'secret law,'" but beyond this basic requirement no circuit appears to have adopted a balancing test for High 2. *Kaganove v. Environmental Protection Agency*, 856 F.2d at 889.

Exemption 2, *any* risk to agency regulation or operations, no matter how trivial or remote, will exempt from disclosure even a document in which there is a compelling public interest. There is no need for a balancing test for Low 2 information: the public simply has no need to know (for example) the parking regulations at NMII, and a request for that data merely wastes taxpayer money and government resources in responding. But members of the public do have a need to know if they will be caught in a fireball if they live, work, or recreate too close to NMII, and a need to have the information necessary to effectively exercise their right to free speech and petition in protesting the Government's decision to put an ammunition storage depot right next to a populated area.

The High 2 reading has created the very situation FOIA was enacted to prevent, wherein government agents are empowered to decide which documents citizens are allowed to see. There is a very real danger that a broad reading of Exemption 2 may lead to the denial of information for improper reasons. In this case, the petitioner is an anti-war activist. The Navy commander who denied his request for blast maps did so because that particular commander believed that giving Mr. Milner the maps "would do little or nothing to promote the purpose of democratic oversight which is at the heart of the Freedom of Information Act."[5] But government agents are not supposed to be deciding whether withholding documents promotes their personal beliefs as to what benefits democracy, and the Ninth Circuit's broad reading of Exemption 2 misreads the statute to do exactly that.

Moreover, High 2 can endanger rather than protect safety. Information that is classified or protected by statute must be kept secret by all, or sanctions apply. By contrast, High 2 does nothing to regulate information that somehow makes it outside the confines of the agency. In this case, the Navy asserts that the ESQD maps at question must be kept secret or the safety of one of the nation's three naval magazines is endangered. But the Navy gave a prior version of the ESQD maps to a local politician and local emergency response agencies, and someone gave it to a newspaper which published it. There are no sanctions for doing so – Exemption 2 is a shield to the government providing information, not a mandate that anyone who receives it keep it secret. If this information were really dangerous to public safety, classifying it or seeking statutory protections from Congress would have meant that whoever provided the map to the newspaper did so only on peril of prosecution and imprisonment. Allowing government agencies to short-cut the classification or statutory protection process through a reliance on an overbroad Exemption 2 places us all at risk that a person who obtains actually dangerous documents may freely disseminate them.

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[5] The quotation is from a declaration submitted by the Navy to the District Court, contained at ER 0075; 77.

B. Review is Necessary to Resolve a Conflict between the Circuits.

This Court's guidelines suggest review of a decision that conflicts with decisions reached by other circuits. Sup. Ct. R. 10(a). Such a conflict is present here. The Sixth and Eighth Circuits hold that High 2 does not exist. In *Hawkes v. Internal Revenue Svc.*, 467 F.2d 787 (6th Cir. 1972), the Sixth Circuit considered a request for IRS manuals. The Sixth Circuit noted that the difference between the House and Senate reports was "total" and that the Senate's limited reading of Exemption 2 was before the House when the House issued its contradictory report. *Id.* at 796-97. Noting further that the Senate's version was in accord with the "the plain import" of the language of Exemption 2, the court held "[f]or all of these reasons we believe that the internal practices and policies referred to in (b)(2) relate only to the employee-employer type concerns upon which the Senate Report focused." *Id.* at 797; *see also Abraham & Rose, P.L.C. v. United States*, 138 F.3d 1075 (6th Cir. 1998); *Rugiero v. U.S. Dep't of Justice*, 257 F.3d 534, 549 (6th Cir. 2001).

Similarly, the Eighth Circuit relied on the Senate report in holding that Exemption 2 "exempts only 'housekeeping' matters." *Cox v. Levi*, 592 F.2d 460, 462-63 (8th Cir. 1979). Later, in *Kuehnert v. FBI,* 620 F.2d 662, 667 (8th Cir. 1980), the Eighth Circuit remanded for in camera inspection FBI documents described as containing "investigative leads" and withheld pursuant to Exemption 2, holding that Exemption 2 "authorizes nondisclosure only of housekeeping matters in which the public could not reasonably be expected to have an interest." (internal citations and quotations omitted).

The Fifth Circuit appears to have left the question open. The Fifth Circuit, noting a "definite conflict" between the House and Senate reports, has held that the "better reasoned decisions hold that the Senate Report more accurately interprets the language of the statute" and declined to exempt from disclosure a staff manual for compliance and safety officers with the Department of Labor. *Stokes v. Brennan*, 476 F.2d 699, 702-03 (5th Cir. 1973).

Despite this holding, a later case claimed in dicta that "there is no need for us to choose" whether the circuit should adopt a High 2 reading. *Sladek v. Bensinger*, 605 F.2d 899, 902 (5th Cir. 1979).

The Tenth Circuit has declined to either adopt or reject the High 2 analysis, instead applying a narrow reading of the term "personnel" to any claim that Exemption 2 exempts material from disclosure. *Audubon Soc'y v. U.S. Forest Svc.*, 104 F.3d 1201, 1204 (10th Cir. 1997).

Four circuits hold that High 2 exists, but have varying tests for its application. In *Caplan v. Bureau of Alcohol, Tobacco & Firearms*, 587 F.2d 544, at 547-549 (2d Cir. 1978), the Second Circuit relied on the House report in finding a High 2 exemption, claiming that this Court "expressed a general preference for the Senate Report" in *Rose*, but that the House report's broader reading of Exemption 2 applied in any case wherein disclosure may risk circumvention of agency regulation. The Second Circuit allowed High 2 to be used to keep secret an Alcohol, Tobacco, and Firearms Training Manual, holding that Exemption 2 "includes internal material such as the withheld portions of the BATF manual where disclosure may risk circumvention of agency regulation." *Id.* at 548.

The District of Columbia Circuit initially adopted the view that Exemption 2 was limited only to the trivial materials held exempt from disclosure in *Rose*, but then reversed course and adopted a High 2 reading. In *Vaughn v. Rosen*, the D.C. Circuit mandated disclosure of Office of Personnel Management documents. *Vaughn v. Rosen*, 523 F.2d 1136 (D.C. Cir. 1975). The *Vaughn* court expressly rejected a High 2 reading, noting that "Congress intended that Exemption 2 be interpreted narrowly and specifically. In our view, the House Report carries the potential of exempting a wide swath of information under the category of operating rules, guidelines, and manuals of procedure" and that "we choose to rely upon the Senate Report" and exempt only "house-keeping matters such as parking facilities, lunchrooms, sick leave, and the like." *Id.* at 1143 (internal quotations and citations omitted); *see also Jordan v. U.S. Dep't of Justice*, 591 F.2d 753, 763 (D.C. Cir. 1978) (en banc). But in 1986, confronted with a demand that the Bureau of Alcohol, Tobacco, and Firearms release training manuals for ATF agents and noting that "Congress believed that FOIA would not mandate release of materials containing law enforcement investigative techniques," the court abandoned *Vaughn* and *Jordan* and adopted a High 2 reading. *Crooker v.*

Bureau of Alcohol, Tobacco & Firearms, 670 F.2d 1051. In *Crooker*, the court attempted to reconcile the House and Senate reports:

> The so-called contradiction between the House and Senate Reports, however, exists only with respect to the exemption of trivial employment matters. The House Report's statement that Exemption 2 permits exemption of more substantive matters-such as manuals of procedure for Government investigators or examiners-is uncontroverted by the Senate Report.

Id. at 1061. This holding directly contradicts this Court's observation in *Rose* that "[t]he House and Senate Reports on the bill finally enacted differ upon the scope of the narrowed exemption," *Rose*, 425 U.S. at 363, 96 S. Ct. at 1600, and with other circuits, including the Sixth Circuit's statement that the difference between the House and Senate Reports was "total." *Hawkes v. Internal Revenue Svc.,* 467 F.2d at 796-97; *see also Cox v. Levi*, 592 F.2d at 462-63.

The D.C. Circuit further added a "predominantly internal" reading to Exemption 2, holding that Exemption 2's "related solely to internal personnel" requirement should be interpreted to mean "predominantly" internal materials. *Crooker*, 670 F.2d at 1056. The *Crooker* court limited its version of High 2 to materials "that public disclosure [of] would risk circumvention of agency regulations." *Id.* at 1073.

The D.C. Circuit recently confronted a High 2 challenge factually similar to the 9th Circuit's decision in this matter, and affirmed the USDA's failure to disclose blueprints of buildings on USDA property. *Elliot v. United States Dep't of Agriculture*, ___ F.3d ___, 2010 WL 668876 (D.C. Cir. Feb. 26,. 2010). The *Elliot* court noted arguments made by the citizen requester on appeal relating to whether blueprints could be personnel documents, and whether the risk of harm posed by disclosing blueprints of buildings was sufficient to trigger High 2 protection under the *Crooker* test, but declined to reach them since they had not been preserved in argument to the District Court.

The Seventh Circuit adopted and broadened the D.C. Circuit's *Crooker* holding, applying High 2 to any material that was predominantly internal, and disclosure of which made it "obsolete for the purpose for which [it was] designed," regardless of whether any law or regulation might be broken following its release. *Kaganove v. Environmental Protection Agency,* 856 F.2d 884, 889 (7th Cir. 1988) (Applying Exemption 2 to E.P.A. personnel documents that rated applicants for promotion).

The Ninth Circuit initially limited High 2 to law enforcement materials, without the *Crooker* "predominantly internal" expansion. In *Hardy v. Bureau of Alcohol, Tobacco, and Firearms*, 631 F.2d 653, 657 (9th Cir. 1980), the Ninth Circuit ruled that ATF manuals were exempt from disclosure, because "[m]aterials that solely concern law enforcement are exempt under Exemption 2 if disclosure may risk circumvention of agency regulation." Similarly, in *Dirksen v. Dep't of Health and Human Services*, 803 F.2d 1456 (9th Cir. 1986), the Ninth Circuit held that claims processing guidelines used by HHS employees to determine which reimbursement claims should be analyzed for law violations were exempt from disclosure. The court noted that these guidelines were "exempt law enforcement material." *Id.* at 1459. By contrast, prior to this case, even non-trivial personnel information which was not clearly related to a law enforcement function was held outside of Exemption 2's ambit. *Maricopa Audubon Soc'y v. U.S. Forest Svc.*, 108 F.3d 1082, 1087 (9th Cir. 1997). In *Maricopa*, the Ninth Circuit held that nest maps were not law enforcement material even though the Forest Service used them to enforce endangered species laws. The court noted that "[the requested information does not tell the Forest Service how to catch lawbreakers; nor does it tell lawbreakers how to avoid the Forest Service's enforcement efforts. In sum, we hold that goshawk nest-site information does not constitute "law enforcement material," and was therefore unprotected by Exemption 2. *Id.* at 1087.

In this case, the majority adopted the *Crooker* test for predominant internality and eliminated the law enforcement limitation, holding that "a personnel document is exempt as "High 2" if it is predominantly internal and its disclosure presents a risk of circumvention of agency regulation." *Milner*, 575 F.3d at 968. Significantly, the *Milner* court also redefined "circumvention of agency regulation" to mean "circumvention of the law." *Id.* at 972. As the dissent explained:

> The majority does not acknowledge the limited sense in which circumvention of agency regulation is used in the case law interpreting Exemption 2. The majority has cited no case-and can cite no case-in which Exemption 2 was applied more broadly than in the cases I

> have just described. In all of the reported cases dealing with the issue, Exemption 2 applies only to documents whose release would risk circumvention *by a regulated person or entity.* Exemption 2 does not apply in this case because there is no such person or entity. The Navy is not acting as a regulatory or law enforcement agency, and the arc maps do not regulate anyone or anything outside the Navy itself.

Id. at 978 (Fletcher, J., dissenting) (emphasis in original).

The Ninth Circuit has gone far afield in this matter from even those other circuits that have adopted the High 2 reading. Under the current state of affairs, a citizen in Cincinnati could receive more information from the Navy than one residing in D.C.; for their part, the D.C. resident could receive more information from the Navy than a citizen in San Francisco. This Court should accept review to resolve this significant conflict between the circuits, and resolve it in favor of disclosure rather than secrecy.

III. CONCLUSION

For the foregoing reasons, Glen Milner respectfully requests that this Court grant the petition for certiorari.

Dated this 22nd day of March, 2010.

Respectfully submitted,

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No. _______

In The Supreme Court of the United States

GLEN SCOTT MILNER,

Petitioner,

v.

UNITED STATES DEPARTMENT OF THE NAVY,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

APPENDIX

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b) This section does not apply to matters that are--

> (1)(A)specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;
>
> (2) related solely to the internal personnel rules and practices of an agency;
>
> (3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;
>
> (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;
>
> (5) inter-agency or intra-agency memorandums or letters which would

not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security

intelligence investigation, information furnished by a confidential source,
(E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or
(F) could reasonably be expected to endanger the life or physical safety of any individual;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

GLEN SCOTT MILNER, Plaintiff, v. UNITED STATES DEPARTMENT OF THE NAVY, Defendant.	CASE NO. CV-06-01301-JCC ORDER

This matter comes before the Court on the parties' cross-motions for summary judgment. (Dkt. Nos. 29 & 30.) Having considered the pleadings, affidavits and the record in this case, and finding oral argument unnecessary, the Court hereby GRANTS Defendant's motion for summary judgment and DENIES Plaintiff's cross-motion, as follows.

I. BACKGROUND

Naval Magazine Indian Island ("NMII") is located in Port Hadlock, Washington, not far from the City of Port Townsend. The mission of NMII is the storage and transshipment of ammunition, weapons, weapons components and explosives in support of the Navy, U.S. Joint forces, Homeland

Security, other federal agencies and Allied forces. (Cmdr. George Whitbred Decl. ¶¶ 3, 15 (Dkt. No. 29-2).) Defendant, the United States Department of the Navy ("Navy"), is responsible for all operations on NMII, including law enforcement, security, force protection and explosives safety. (*Id.* ¶ 3.)

Explosive Safety Quantity Distance ("ESQD") information is a tool utilized by the Navy's explosive safety program. (*Id.* ¶ 17.) Specifically, ESQD information measures the effects of an explosion at varying distances. As such, it defines minimum separation distances for various quantities of explosives. Its purpose is to afford reasonable safety to persons and property, both within NMII and on adjacent public and private property. The information is used to design, array, and construct ammunition storage facilities, and to organize ammunition operations. ESQD determinations are typically expressed as mathematic formulas and "arc maps." (*Id.* ¶ 10.) The Navy evaluates requests for ESDQ information on a case-by-case basis and does not release the information to the general public "if a determination is made that the release might pose a serious threat of death or injury to any person[.]" (*Id.* ¶ 12.) However, the Navy does sometimes share information with local municipalities for governmental purposes, such as emergency response preparedness. ESQD information specific to NMII has been shared with "first responders" at both

Jefferson County and the City of Port Townsend. (*Id.*)

This case arises out of the partial denial of two substantially identical Freedom of Information Act ("FOIA") requests,[1] submitted by Plaintiff Glen Milner to the Navy in late 2003 and early 2004. Through these requests, Mr. Milner sought:

> 1. All documents on file regarding ESQD arcs or explosive handling zones at the ammunition depot at NMII, including all documents showing impacts or potential impacts of activities in the explosive handling zones to the

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[1] Plaintiff's Complaint implies that there was a substantive difference between Mr. Milner's two requests and claims that the Navy never responded to his second request, beyond notifying him that the two requests were consolidated. (Cmpl. ¶¶ 37-41 (Dkt. No. 1).) The Court has compared the two requests and finds absolutely no meaningful difference between them. The first request was addressed to "Commanding Officer, Naval Magazine Indian Island," and the second to "Commanding Officer, Naval Ordnance Safety and Security Activity," and there are some minor word changes in the second (e.g., in several places the words "Naval Magazine" have been inserted before "Indian Island"). (Milner Ltrs. Dec. 7, 2003 & Feb. 3, 2004 (Dkt No. 23, Tabs 1 & 53).) Finding no substantive difference between them, the Court holds the Navy properly consolidated the two requests and treats them as the same request for the purposes of this Order.

> ammunition depot and the surrounding areas;
>
> 2. All maps and diagrams of the ammunition depot at NMII which show ESQD arcs or explosive handling zones; and
>
> 3. Documents regarding any safety instructions or operating procedures for Navy or civilian maritime traffic within or near the explosive handling zones or ESQD arcs at NMII.

(Milner Ltrs. Dec. 7, 2003 & Feb. 3, 2004 (Dkt No. 23, Tabs 1 & 53).) Initially, a total of 17 document packages, totaling approximately 1000 pages, were identified as responsive to Mr. Milner's request. (Anthony J. Robinson Decl. ¶ 21 (Dkt. No. 29-4).) The administrative process that followed that initial identification was, in the Navy's words, "tortuous," "complicated" and "lengthy," admittedly perhaps unnecessarily so. (Def.'s Mot. 4 (Dkt. No. 29).) Eventually, the Navy did release many of the documents identified and requested, some in redacted form. (Katherine George Decl. (Dkt. No. 33 at 5-154).)

Through this action, filed on September 11, 2006, Mr. Milner seeks an order requiring the Navy to promptly provide him with the remainder of the information identified as responsive to his request:[2] approximately 80 documents, withheld either in whole or in part, relating to the ESQD arc information. (*See* Vaughn Index (Dkt. No. 29-8).) In addition, Mr. Milner requests the Court order the Navy to waive all fees associated with disclosure of any documents that are ordered released, declare the Navy's refusal and failure to respond to Mr. Milner's FOIA requests and appeals in a timely manner to be unlawful under FOIA, and award Mr. Milner attorneys' fees and costs. (Cmpl. 12 (Dkt. No. 1).) The parties agree that Mr. Milner has exhausted his administrative remedies, and the Court has jurisdiction pursuant to 5 U.S.C. § 552(a)(4)(B).

The Navy maintains that the remaining ESQD arc information was properly withheld and is exempt from disclosure under FOIA exemptions 2 and 7(F). It is the Navy's position that the information could be used by persons of ill-will to identify the location and quantity--and in turn, vulnerabilities--of dangerous explosives, ordnance or ammunition stored at NMII, which knowledge would threaten the security of the base and place in jeopardy the safety of base personnel and the surrounding community. Specifically, the current Commanding Officer of NMII, Cmdr. Whitbred, asserts that after close review of the record he strongly agrees with his predecessor's analysis of the potential security repercussions if the withheld documents are released:

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[2] Mr. Milner's original request and Complaint also sought disclosure of the OP-5 Manual, which sets forth safety regulations for the storage, handling and production of ammunition and explosives at Navy and Marine Corps installations throughout the world, and defines the effects of both accidental and intentional detonations. (Richard Adams Decl. ¶¶ 4, 6 (Dkt. No. 29-3).) Mr. Milner has since withdrawn his request for the OP-5 Manual (Pl.'s Resp. & Cross-Mot. for Summ. J. 2 n.1 (Dkt. No. 30); Glen Milner Decl. ¶ 17 (Dkt. No. 31)) and his claims relating to this manual are DISMISSED with prejudice.

> [A]rmed with this information, a lay person with a rudimentary knowledge of mathematics could easily determine: the precise location of ordnance magazines[;] the types of items stored in them; which locations to target for maximum damage to personnel, critical infrastructure and disruption of loading and off-loading of ships; the mission capability of the installation; the installation's battle group capability and operational sustainability; the location of personnel and the precise numbers of personnel required to load and offload a ship.

(Cmdr. Whitbred Decl. ¶ 8 (Dkt. No. 29-2).) In addition, Cmdr. Whitbred adds that the withheld information could also disclose the quantities of materials stored. (*Id.*)

In support of their motions for summary judgment, both parties have submitted multiple declarations and other documentation. In addition to Cmdr. Whitbred's declaration, The Navy offers declarations from NMII's Emergency Management Officer, Stephen Smith, and the Legal Assistant to the General Counsel for Navy Region Northwest, Anthony Robinson.[3] These declarations are submitted together with a base map of NMII, and a *Vaughn* Index. Plaintiff submits declarations from himself and his attorneys, together with exhibits that include news articles and documents the Navy released to him in response to his FOIA request.

II. FOIA

"The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). To this end, the Act establishes a statutory presumption that any person has a judicially enforceable right to obtain access to federal agency records upon a properly presented request, regardless of the motivation for the request. *See e.g.*, *Doherty v. U.S. Dep't of Justice*, 596 F. Supp. 423, 424, 429 (S.D.N,Y. 1984) (finding DOJ's description of requester, an undocumented alien, "in lurid detail as a terrorist, a liar, a smuggler of arms, an ambusher and a hostage-taker, who used a machine gun in a residential neighborhood, all apparently in what he regards as a fight for freedom and in support of a just cause" irrelevant in determining FOIA's applicability), The presumption in favor of disclosure may be rebutted by a valid showing that the information sought falls within one of the nine exemptions contained within the Act. 5 U.S.C. § 552(d). *See, e.g.*, *Church of Scientology of Cal. v. U.S. Dep't of Army*, 611 F.2d 738, 742 (9th Cir. 1979). However, these nine exemptions are to be narrowly construed and the agency resisting disclosure bears the burden of demonstrating that an exemption applies. 5 U.S.C. § 552(b); *Church of Scientology*, 611 F.2d at 742.

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[3] The Navy also submitted a declaration from Richard Adams, an Explosives Safety Technical Expert at the Naval Ordnance Safety and Security Activity, describing how the Navy manages requests for copies of the OP-5 Manual, (Dkt. No. 29-3.) Because Mr. Milner has since withdrawn his request for the OP-5 Manual, Mr. Adams' declaration was not considered by the Court in deciding this motion.

The decision whether to invoke an exemption is discretionary: so long as releasing the information would not violate another statute, an agency *may* disclose information that could be properly withheld under an exemption. *Chrysler Corp. v. Brown*, 441

U.S, 281, 292-93 (1979). However, once disclosure occurs with the apparent authority of the agency, any exemption is deemed to have been waived as to the information disclosed.[4] Because FOIA does not allow for selective disclosure, agencies must accordingly evaluate the risks that would flow from releasing an otherwise exempted document "in terms of what anyone else might do with" the released information. *Swan v. SEC*, 96 F.3d 498, 500 (D.C. Cir. 1996).

II. LEGAL STANDARD

A. Summary Judgment in General

Summary judgment motions are governed by Federal Rule of Civil Procedure 56(c), which provides in relevant part, that "[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). The inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986). The party moving for summary judgment has the burden to show initially the absence of a genuine issue concerning any material fact. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159 (1970). When the moving party will have the burden of proof on an issue at trial, it must affirmatively demonstrate that no reasonable trier of fact would find other than for the moving party. However, once the moving party has met its initial burden, the burden shifts to the nonmoving party to establish the existence of an issue of fact regarding an element essential to that party's case, and on which that party will bear the burden of proof at trial. If the nonmoving party fails to make this showing, "the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986).

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[4] Waiver only applies, however, to the *same* record or portion of a record released; it does not apply, for example, where the substance of the record was disclosed, but not the record itself, or to a record similar to, but not duplicative of, an already disclosed record. *See, e.g., Mobil Oil Corp. v. U.S EPA*, 879 F.2d 698, 700-01 (9th Cir. 1989).

B. Summary Judgment in FOIA Cases

Nearly all FOIA cases are resolved on summary judgment. *Nat'l Res. Def. Council v. U.S. Dep't of Def.*, 388 F.Supp.2d 1086, 1094 (C.D. Cal. 2005) (quoting *Mace v. EEOC*, 37 F.Supp.2d 1144, 1146 (E.D. Miss. 1999)). Whether a particular document fits into one of FOIA's nine exemptions is a question of law, appropriately resolved by the court. *Schiffer v. FBI*, 78 F.3d 1405, 1409 (9th Cir.

1996) (quoting *Ethyl Corp. v. U.S. EPA*, 25 F.3d 1241, 1246 (4th Cir. 1994)). The district court determines whether an exemption applies *de novo*. 5 U.S.C. § 552(a)(4)(B).

An agency seeking to invoke one of the exemptions bears the burden of proving that exemption, both for documents wholly withheld and partially redacted. 5 U.S.C. § 552(a)(4)(B); *U.S. Dep't of State v. Ray*, 502 U.S. 164, 173 (1991). The agency may satisfy its burden by submitting detailed affidavits demonstrating that the information "logically falls within the claimed exemptions." *Minier v. CIA*, 88 F.3d 796, 800 (9th Cir. 1996) (quoting *Hunt v. CIA*, 981 F.2d 1116, 1119 (9th Cir. 1992)). These affidavits, which may include a *Vaughn* Index, cannot be merely conclusory; they "must contain reasonably detailed descriptions of the documents and allege facts sufficient to establish an exemption." *Kamman v. IRS*, 56 F.3d 46, 48 (9th Cir. 1995).

If submitted in good faith and not controverted by contrary evidence in the record, such affidavits are to be accorded substantial weight in evaluating a claim for exemption. *Minier*, 88 F.3d at 800. Respect for an agency's informed judgment is particularly important where concerns about national security are implicated. *See, e.g., Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 927 (D.C. Cir. 2003). Finally, a requester's opinion simply disputing the risk asserted by an agency possessing relevant experience that has provided sufficiently detailed affidavits is not sufficient to preclude summary judgment for the agency. *See, e.g., Struth v. FBI*, 673 F.Supp. 949, 954 (E.D. Wis. 1987). *See also Halperin v. CIA*, 629 F.2d 144, 149 (D.C. Cir. 1980) ("A court must take into account . . . that any affidavit . . . of threatened harm to national security will always be speculative to some extent[.]").

III. THE *VAUGHN* INDEX AND CMDR. WHITBRED'S AFFIDAVIT

Mr. Milner argues that the *Vaughn* Index submitted by the Navy, together with Cmdr. Whitbred's affidavit, fails to describe with adequate particularity the reasons for withholding each individual document, or portion thereof. An adequate *Vaughn* Index requires both detailed descriptions of the withheld documents and particularized explanations as to why each document was properly withheld. *Lion Raisins Inc. v. U.S. Dep't of Agriculture*, 354 F.3d 1072, 1082 (9th Cir. 2004). *See also Wiener v. FBI*, 943 F.2d 972, 977 (9th Cir. 1991) (finding the index and affidavits must include a "particularized explanation of how disclosure of the particular document would damage the interest protected by the claimed exemption."). Unless both requirements are met, the *Vaughn* Index should be found inadequate, containing only "conclusory and generalized allegations." *See Church of Scientology*, 611 F.2d at 742 (quoting *Vaughn v. Rosen*, 484 F.2d 820, 826 (D.C. Cir. 1973)). Mr. Milner does not argue that the Navy has failed to adequately describe the withheld documents; he argues that Cmdr. Whitbred's explanation as to why ESQD information should be withheld is inadequate because it offers only a generalized explanation, not specific to each of the withheld documents listed in the *Vaughn* Index.

In applying the particularity requirement, the facts of *Weiner* are instructive. There, the FBI offered "'boilerplate' explanations . . . drawn from a 'master' response filed by the FBI for many FOIA requests." *Weiner*, 943 F.2d at 978. The FBI had made "no effort" to tailor the explanation to the specific documents withheld, or even to the particular FOIA request at issue. *Id.* at 978-79 (noting the request was for records of the FBI's investigation concerning the death of John Lennon, but "[r]emarkably, in the original *Vaughn* index submitted by the FBI, John Lennon's name does not appear at all."). In finding that the FBI's lackluster attempt failed to meet both the specificity and particularity requirements of a *Vaughn* Index inquiry, the court emphasized the purpose of a *Vaughn* Index is to provide the requester with the opportunity to argue for release of particular documents. This opportunity is only meaningful "if the requester knows the precise basis for nondisclosure." *Id.* at 979. *See also Lion Raisins*, 354

F.3d at 1083-84 (finding government affidavits inadequate when submitted entirely *ex parte*, so that no public disclosure whatsoever was made of the government's reasoning, wholly depriving the court of informed advocacy.)

Here, the Court finds that the *Vaughn* Index submitted by the Navy, together with Cmdr. Whitbred's declaration, provide Mr. Milner with sufficient information to enable him to argue for release of particular documents. Mr. Milner takes no issue with the specificity of description of each of the documents listed in the *Vaughn* Index. Moreover, Cmdr. Whitbred's explanation as to why the documents are properly withheld is specific to ESQD information, which the *Vaughn* Index makes clear each of the documents contain. Together, the *Vaughn* Index and Cmdr. Whitbred's explanation serve the purpose identified in *Weiner*. If Mr. Milner wished to contest the withholding of a specific document (instead of all of the withheld documents generally, as he does in the instant action), he would simply need to look to the description (e.g., Bates No. 00019, described as "Bishop Spit Site Map details ESQD arcs relationship to BLDG 837 to other nearby facilities") and look to Cmdr. Whitbred's declaration, and he would have all the information he needs to argue that the safety concerns particular to ESQD arc information expressed by Cmdr. Whitbred were not proper as to that document.

The Court does not read *Weiner* and *Lion Raisins* to require the *Vaughn* Index to repeat, for each and every document, Cmdr. Whitbred's concerns specific to ESQD arc information, where the concerns and justifications for withholding are properly the same for each document. Accordingly, the Court finds that the *Vaughn* Index, together with Cmdr. Whitbred's affidavit, provides an adequate basis for Mr. Milner to argue and the Court to determine whether the documents were properly withheld.

IV. EXEMPTION 2

FOIA's exemption 2 provides that an agency need not disclose matters "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. 552(b)(2). This breviloquent provision encompasses two different categories of internal agency matters. What are generally termed "low 2" materials are fairly trivial matters, not likely to spark a genuine and significant public interest, such as rules related to employee use of parking facilities or regulation of lunch hours. *See Hardy v. Bureau of Alcohol, Tobacco & Firearms*, 631 F.2d 653, 655 (9th Cir. 1980). In contrast, "high 2" materials are those, which if disclosed, "may risk circumvention of agency regulation." *Id.* at 656 (quoting *Dep't of Air Force v. Rose*, 425 U.S. 352, 369 (1976)). The Navy argues that the ESQD information at issue here was properly withheld as high 2 information.

The parties, however, disagree as to the test properly applied to "high 2" materials in the Ninth Circuit. The Navy argues that the Court should apply the widely accepted *Crooker* test, which requires the Court first find that the documents at issue are "predominantly internal" and second, that disclosure would significantly risk circumvention of agency regulation or statute. *Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051, 1074 (D.C. Cir. 1981). Mr. Milner objects, arguing that the Ninth Circuit has never adopted the *Crooker* test, and that the test applied in this circuit was announced in *Hardy v. Bureau of Alcohol, Tobacco & Firearms*. That test, according to Mr. Milner, does not ask whether the documents are "predominantly internal," instead, it asks whether the information at issue is "law enforcement material." If the information is not law enforcement materials then the inquiry is over, because Mr. Milner asserts that in the Ninth Circuit no other kind of agency information is protected as high 2 material.

Plaintiff's argument relies on a superficial and selective reading of *Hardy* and its progeny. *Hardy* itself involved a FOIA request for quintessential law enforcement materials. *Hardy*, 631 F.2d at 655. However, since *Hardy*, cases that have at least nominally attempted to apply its "law enforcement" language have done so broadly, and have protected under that mantle information not traditionally or obviously defined as such. *See, e.g., Dirksen v. U.S. Dep't of Health & Human Servs.*, 803 F.2d 1456, 1458-59 (9th Cir. 1986) (finding DHHS' internal processing guidelines for claims submitted by health care providers under the Medicare program properly withheld as "law enforcement material"). Furthermore, the most recent Ninth Circuit case to address the proper application of exemption 2 clearly indicated that the exemption embraces more than law enforcement materials. Specifically, *Maricopa Audubon Society v. United States Forest Service* held "that goshawk nest-site information does not constitute 'law enforcement material,' *or any other kind of material* that may be withheld under exemption 2." 108 F.3d 1082, 1087 (9th Cir. 1997) (emphasis added).

In fact, when *Hardy*, *Dirksen* and *Maricopa* are read together, the test they embody bears more than a passing resemblance to the *Crooker* test. As in *Crooker*, the Ninth Circuit cases have asked whether disclosure would risk circumvention of law, *see, e.g., Dirksen*, 803 F.2d at 1458, and if the material is "predominately internal." *Maricopa*, 108 F.3d at 1085. The "law enforcement" material held protected in *Hardy* and *Dirksen* met these two requirements; the goshawk nest location information at issue in *Maricopa* did not. Applying this test, as discussed below, the Court finds the ESQD materials were properly withheld under exemption 2.

First, the Navy asserts and Mr. Milner does not dispute that the ESQD arc information was compiled for predominately internal purposes: to design, array, and construct ammunition storage facilities, and to organize ammunition operations. (Cmdr. Whitbred Decl. ¶ 10 (Dkt. No. 29-2).) (*See also* Pl.'s Reply 12 (Dkt. No. 37) (asserting that the ESQD records were complied "for the sole purpose of obtaining internal administrative approval of construction projects.").) That the information is also made available to local municipalities does not negate the fact that these documents are predominantly internal.

Second, the Court finds that disclosure of the ESQD arc information withheld in each of the documents listed in the *Vaughn* Index would significantly risk circumvention of law. The "law" sought to be circumvented need not be defined by a particular agency regulation or statute. *See e.g., Nat'l Treasury Employees Union v. U.S. Customs Serv.*, 802 F.2d 525, 530-31 (D.C. Cir. 1986) (finding the circumvention of law analysis "is satisfied whether or not the agency identifies a specific statute or regulation threatened by disclosure."). That the disclosure would cause the information to lose its utility is sufficient. *See, e.g., Dirksen*, 803 F.2d at 1459. *See also L.A. Times Commc'ns, LLC v. Dep't of Army*, 442 F.Supp.2d 880, 902 (C.D. Cal. 2006) (finding exempt information that, if disclosed, "would risk circumvention of the law and the military's efforts to establish stability for reconstruction efforts Iraq [*sic*].") Moreover, under the "mosaic" approach, the exemption has been applied to protect information contained in several documents that are not by themselves dangerous, but could in the aggregate be assembled to reveal sensitive information, which disclosure could be dangerous. *See, e.g.*, *L.A. Times*, 442 F.Supp.2d at 898-99 (quoting *Davin v. U.S. Dep't of Justice*, 60 F.3d 1043, 1064-65 (3d Cir. 1995)).

In addition, when the government interest involved is particularly weighty--such as where concerns about national security are justified--courts are more likely to defer to the agency's expertise in assessing the risk of disclosure. *See, e.g.*, *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 926, 927-28 (surveying the significant authority "counseling deference in national security matters"). The Court disagrees with Plaintiff's assertion that this case "is not about national security." (Pl.'s Reply 7 (Dkt. No. 37).) Plaintiff appears to take the position that national security is only implicated when the information at issue is "classified as secret" or is of a type that is never released to the public. Information need not be "secret" to implicate national security. That the Navy finds it advisable to, for example, share information with local municipalities[5] in order to better equip first responders in the event of an emergency does not undermine the legitimacy of the Navy's risk assessment. Such a conclusion would be antithetical to any definition of the word "security."

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[5] Somewhat mystifyingly, Plaintiff also points to the fact that the Navy "routinely" distributes this information

Accordingly, the Court finds that Cmdr. Whitbred's risk assessment is entitled to deference. Plaintiff does not offer any evidence truly disputing the Navy's risk assessment. Instead, Plaintiff essentially argues that because the Navy has released some ESQD arc information in the past, its assertion that release of the information at issue presents a legitimate risk cannot be taken seriously. The Court disagrees with Plaintiff's judgment and finds that the information was properly withheld under exemption 2. First, its release could cause the information to lose its utility in keeping people and property safe from harm in the event of an explosive incident. Second, it could provide essentially a roadmap to wreak the most havoc possible to those persons bent on causing harm, risking circumvention of the Navy's security, force protection and explosives safety efforts. To release this information would be to provide the proverbial fox a virtual map to the chicken coop. *See Dirksen*, 803 F.2d at 1459.

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internally to "hundreds of Navy personnel" as somehow supporting his stance that this case is "not about national security."

VI. SEGREGABILITY

Even where material falls within one of the enumerated exemptions, FOIA requires disclosure of "[a]ny reasonably segregable portion of a record . . . after deletion of the portions which are exempt." 5 U.S.C. § 552(b). It is reversible error for a district court "to simply approve the withholding of an entire document without entering a finding on segregability, or the lack thereof." *Church of Scientology*, 611 F.2d at 744. Non-exempt portions of a document must be disclosed unless the court finds that they are "inextricably intertwined with exempt portions" to such a degree that separating the two would "impose significant costs on the agency and produce an edited document with little informational value." *Willamette Indus., Inc. v. U.S.*, 689 F.2d 865, 867-68 (9th Cir. 1982) (quoting *Mead Data Cent., Inc. v. U. S. Dep't of Air Force*, 566 F.2d 242, 260-61 (D.C.Cir. 1977)).

Having reviewed the affidavits, particularly that of Anthony Robinson, which provides a detailed outline of the Navy's efforts over four years to respond to Mr. Milner's request, the *Vaughn* Index, and the documents provided to Mr. Milner in whole and in part attached to Ms. George's declaration, the Court finds that the Navy has met FOIA's segregability requirement. Many of the materials the Navy released to Mr. Milner were redacted; per the *Vaughn* Index, the materials withheld are only those related specifically to ESQD information, which was properly withheld under exemption 2.

VII. CONCLUSION

For the foregoing reasons, this Court finds that the ESQD information was properly withheld under FOIA's exemption 2. The Court does not reach whether the information could also have been properly withheld under exemption 7(F). In addition, as to Plaintiff's request that the Court declare the Navy's refusal and failure to respond to Mr. Milner's FOIA requests and appeals in a timely matter was unlawful under FOIA, this request is also DENIED. The proper remedy when an agency fails to comply in a timely manner with FOIA is for the requester to bring an action in district court. 5 U.S.C. § 552(a)(6)(C). Accordingly, the Court GRANTS Defendant's motion for summary judgment and DENIES Plaintiff's cross-motion.

SO ORDERED this 30th of October, 2007.

John C. Coughenour
United States District Judge

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

GLEN SCOTT MILNER,
Plaintiff-Appellant,
v.
UNITED STATES DEPARTMENT OF THE NAVY,
Defendant-Appellee.

No. 07-36056
D.C. No.
CV-06-01301-JCC
OPINION

Appeal from the United States District Court
for the Western District of Washington
John C. Coughenour, District Judge, Presiding

Argued and Submitted
March 12, 2009—Seattle, Washington

Filed August 5, 2009

Before: William A. Fletcher, Ronald M. Gould and
Richard C. Tallman, Circuit Judges.

Opinion by Judge Tallman;
Dissent by Judge W. Fletcher

COUNSEL

David S. Mann and Keith P. Scully, Seattle, Washington, for the appellant.

Peter A. Winn, Assistant United States Attorney, Seattle, Washington, for the appellee.

OPINION

TALLMAN, Circuit Judge:

This appeal highlights the tension between the public's right of access to government files under the Freedom of

Information Act and the countervailing need to preserve sensitive information for efficient and effective government operations. Glen Scott Milner appeals the denial of a request he filed pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. He sought information that would identify the locations and potential blast ranges of explosive ordnance stored at Washington's Naval Magazine Indian Island ("NMII"). The district court granted summary judgment in favor of the Navy. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

I

Indian Island is a small island strategically located in Puget Sound near the towns of Port Hadlock and Port Townsend, Washington. The island is used to store and transship munitions, weapons, weapon components, and explosives for the Navy, U.S. Joint Forces, Department of Homeland Security, and other federal agencies and allied forces. The Navy is responsible for all operations on NMII.

Magazine management and safety operations are conducted pursuant to a Navy manual entitled *Ammunition and Explosives Ashore Safety Regulations for Handling, Storing, and Production Renovation and Shipping* ("OP-5 manual"). Though the Navy considers the OP-5 manual to be restricted information, Milner managed to purchase one section of the manual on the Internet. The portion of the OP-5 manual in the record of this case states:

> The purpose of this volume is to acquaint personnel engaged in operations involving ammunition, explosives, and other hazardous materials, and to prescribe standardized safety regulations for the production, renovation, care, handling, storage, preparation for shipment, and disposal of these items.

The OP-5 manual also calls for development of technical drawings and specifications, which "should be consulted for additional, detailed requirements."

The technical information developed pursuant to the OP-5 manual includes Explosive Safety Quantity Distance ("ESQD") data. The ESQD calculations measure the effects of an explosion at a particular location. The information is expressed either as a mathematical formula or as an arc map, where the center of the arc is the source of an explosion and the arc's periphery is the maximum area over which the force of the explosion would reach. The Navy uses this information to design and construct NMII ammunition storage facilities in compliance with the safety guidelines spelled out in OP-5. The ESQD arcs indicate the maximum amounts of explosives that should be stored in any one storage facility, and minimum distances that various explosives should be stored from one another. This aids the Navy in storing ordnance in such a way that the risk of chain reactions, or "sympathetic detonations," is minimized if one storage facility suffers an attack or accident. The ESQD arcs are "designed to be a long term planning tool for the Navy."

Milner is a Puget Sound resident and a member of the Ground Zero Center for Nonviolent Action, an organization dedicated to raising community awareness of the dangers of the Navy's activities. On December 7, 2003, and January 29, 2004, he submitted two FOIA requests to the Navy.[1] He requested three types of documents:

> 1. [A]ll documents on file regarding [ESQD] arcs or explosive handling zones at the ammunition depot at Indian Island. This would include all documents showing impacts or potential impacts of activities in

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[1] The district court found Milner's two requests "substantially identical" and treated them as a single FOIA request. We agree with the district court's assessment.

> the explosive handling zones to the ammunition depot and the surrounding areas;
>
> 2. [A]ll maps and diagrams of the ammunition depot at Indian Island which show ESQD arcs or explosive handling zones; and
>
> 3. [D]ocuments regarding any safety instructions or operating procedures for Navy or civilian maritime traffic within or near the explosive handling zones or ESQD arcs at the ammunition depot at Indian Island.

The Navy identified 17 document packages totaling about 1,000 pages that met these parameters. The Navy compiled a thorough index of the relevant documents and disclosed most of them to Milner. It withheld only 81 documents, claiming that their disclosure could threaten the security of NMII and the surrounding community.

Milner filed suit under FOIA to compel disclosure of the remaining documents related to ESQD information. Commander George Whitbred, Commanding Officer of NMII, and other officers filed detailed affidavits discussing the nature and uses of the ESQD information. The commander's affidavit specified his concern that the information, if disclosed, could be used to plan an attack or disrupt operations on NMII. Both parties moved for summary judgment. The Navy argued the documents were exempt from disclosure under 5 U.S.C. §§ 552(b)(2) ("Exemption 2") and (b)(7)(f) ("Exemption 7"). The district court granted summary judgment in favor of the Navy under Exemption 2. *Milner v. U.S. Dep't of Navy*, No. C06-1301-JCC, 2007 WL 3228049 (W.D. Wash. Oct. 30, 2007). It did not reach the question whether the documents would also be exempt under Exemption 7. Milner timely appealed.

II

We apply a two-step standard of review to summary judgment in FOIA cases. "The court first determines under a *de* *novo* standard whether an adequate factual basis exists to support the district court's decisions. If an adequate factual basis exists, then the district court's conclusions of fact are reviewed for clear error, while legal rulings, including its decision that a particular exemption applies, are reviewed *de novo*." *Lane v. Dep't of Interior*, 523 F.3d 1128, 1135 (9th Cir. 2008) (internal citations omitted). Both parties agree that an adequate factual basis exists to support the district court's decision. They dispute only the applicability of the exemptions from disclosure.

An agency bears the burden of proving it may withhold documents under a FOIA exemption. 5 U.S.C. § 552(a)(4)(B); *U.S. Dep't of State v. Ray*, 502 U.S. 164, 173 (1991). It may meet this burden by submitting affidavits showing that the information falls within the claimed exemption. *Minier v. CIA*, 88 F.3d 796, 800 (9th Cir. 1996). "In evaluating a claim for exemption, a district court must accord substantial weight to [agency] affidavits, provided the justifications for nondisclosure are not controverted by contrary evidence in the record or by evidence of [agency] bad faith." *Id.* (internal quotations omitted).

III

A

[1] FOIA reflects "a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." *Dep't of the Air Force v. Rose*, 425 U.S. 352, 360-61 (1976) (quoting S. Rep. No. 813-89, at 3 (1965)). An agency may withhold a document, or portions thereof, only if the material falls into one of the nine statutory exemptions delineated by Congress in § 552(b). *Id.* at 361. These nine exemptions are "explicitly exclusive." *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 151 (1989) (quoting *FAA Adm'r v. Robertson*, 422 U.S. 255, 262 (1975)). The delineated exemptions "are to be interpreted narrowly." *Lahr* *v. NTSB*, 569 F.3d 964, 973 (9th Cir. 2009) (quotation omitted).

[2] Our concern in this case is the scope of Exemption 2. That section exempts from disclosure matters that are "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2). There are two categories of information that may fall within Exemption 2's ambit—"Low 2" and "High 2." Low 2 materials include rules and practices regarding mundane employment matters such as parking facilities, lunch hours, and sick leave, which are not of "genuine and significant public interest." *See Rose*, 425 U.S. at 363 (citing S. Rep. No. 813-89, at 8 (1965)); *id.* at 369; *Hardy v. Bureau of Alcohol, Tobacco & Firearms*, 631 F.2d 653, 655 (9th Cir. 1980).

[3] The High 2 exemption protects more sensitive government information.[2] This category applies to "internal personnel rules and practices," disclosure of which "may risk circumvention of agency regulation." *Rose*, 425 U.S. at 369; *see, e.g.*, *Schiller v. NLRB*, 964 F.2d 1205, 1208 (D.C. Cir. 1992) (holding an agency's litigation strategy "does qualify as 'high 2' material because its disclosure would risk circumvention of statutes or agency regulations"). Only the High 2 category is at issue here.

B

[4] Information may be exempted as High 2 if it (1) fits within the statutory language and (2) would present a risk of circumvention if disclosed. *See Morley v. CIA*, 508 F.3d 1108,

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[2] This category developed from Rose, in which the Supreme Court held that Air Force disciplinary studies were not exempt from disclosure because they were a matter of genuine and significant public interest. 425 U.S. at 364-70. However, the Court explicitly left open the question whether Exemption 2 would cover situations "where disclosure may risk circumvention of agency regulation." *Id.* at 369.

1124 (D.C. Cir. 2007) (citing *Schwaner v. Dep't of Air Force*, 898 F.2d 793, 794 (D.C. Cir. 1990)). The essential question in this case is what standard we employ to determine whether the requested information relates sufficiently to the "internal personnel rules and practices" of the agency, as required by the statute. The Navy argues we should apply the "predominantly internal" standard employed by the D.C. Circuit. Milner argues our prior caselaw forecloses this approach, and that our inquiry is limited to whether the information at issue is "law enforcement material."

[5] In *Hardy v. Bureau of Alcohol, Tobacco & Firearms*, we addressed the question of circumvention left open in *Rose*. 631 F.2d at 656. We considered FOIA requests for the ATF's *Raids and Searches* manual. We joined the Second Circuit in holding that "law enforcement materials, the disclosure of which may risk circumvention of agency regulation, are exempt under Exemption 2." *Id.* (citing *Caplan v. Bureau of Alcohol, Tobacco & Firearms*, 587 F.2d 544 (2d Cir. 1978)). *Hardy* concluded that the instructions contained in the manual "concern[ed] internal personnel practices" and were therefore exempt from disclosure under Exemption 2. *Id.*

[6] Following our decision in *Hardy*, the D.C. Circuit decided *Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051 (D.C. Cir. 1981) (en banc). Like the plaintiff in *Hardy*, the plaintiff in *Crooker* sought disclosure of portions of the same ATF raid manual. Our sister circuit noted that the materials sought were "law enforcement" in nature, but went on to formulate a "predominantly internal" standard to determine which personnel materials could be withheld under Exemption 2. *Id.* at 1072-74.

[7] The D.C. Circuit undertook an extensive analysis of FOIA's structure and legislative history, its underlying policy, and the applicable caselaw. It concluded that "the words 'personnel rules and practices' encompass not merely minor employment matters, but may cover other rules and practices governing agency personnel, including significant matters like job training for law enforcement personnel." *Id.* at 1056. To balance the competing implications of the words "related" and "solely," the court settled on the modifier "predominantly."[3] *Id.* at 1056-57; *see Schwaner*, 898 F.2d at 795. The court ultimately determined that documents related to personnel rules and practices should be exempt when the materials are "predominantly internal."

[8] The Navy argues that the Ninth Circuit's caselaw post-*Hardy* has essentially adopted this standard, or, in the alternative, that we should do so explicitly. The district court granted summary judgment on this ground, reasoning that our cases take such a broad view of the term "law enforcement" that "the test they embody bears more than a passing resemblance" to the D.C. Circuit's "predominantly internal" standard. *Milner*, 2007 WL 3228049 at *7. We agree that Exemption 2 is not limited to "law enforcement" materials, and now take the opportunity to formally endorse the D.C. Circuit's analysis, as set forth in *Crooker*. We hold that Exemption 2 shields those personnel materials which are predominantly internal and disclosure of which would present a risk of circumvention of agency regulation.

Our existing caselaw is consistent with the D.C. Circuit's approach. *Hardy* held that "law enforcement materials, the disclosure of which may risk circumvention of agency regulation, are exempt under Exemption 2." 631 F.2d at 656. It did not hold that *only* law enforcement materials are exempt under Exemption 2. The shorthand descriptor "law enforcement materials" was apt in *Hardy* because the case concerned policies and procedures for executing search warrants. The *Crooker* court apparently understood that *Hardy* addressed law enforcement materials but did not limit Exemption 2 to such information, relying on *Hardy* without adopting or even considering the use of "law enforcement" as a generally applicable standard. 670 F.2d at 72. The *Crooker* court, like the Second Circuit in *Caplan* and our panel in *Hardy*, used "law enforcement" to describe the materials at issue. *Id.* at 1056, 1057. It went on to determine that the manuals were "predominantly internal" and that their disclosure "significantly risks circumvention of the federal statutes or regulations." *Id.* at 1073-75.

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[3] The court relied on Judge Leventhal's analysis in a prior case:

> [P]ushed to their logical ends, "relating" is potentially all-encompassing while "solely" is potentially all-excluding. It seems unlikely that Congress intended either extreme, and that "solely" in this context has to be given the construction, consonant with reasonableness, of "predominantly."

Crooker, 670 F.2d at 1056-57 (quoting *Vaughn v. Rosen*, 523 F.2d 1136, 1150-51 (D.C. Cir. 1975) (Leventhal, J., concurring)).

[9] *Maricopa Audubon Society v. United States Forest Service*, 108 F.3d 1082 (9th Cir. 1997), our most recent case examining Exemption 2, also treated the "law enforcement" test as merely one way to meet Exemption 2's requirements. *Maricopa* first held generally that goshawk nesting site data does not "relate 'solely,' or even predominantly, 'to the internal personnel rules and practices of an agency.' " *Id.* at 1085 (quoting 5 U.S.C. § 552(b)(2)). It relied heavily on cases from the Tenth and D.C. Circuits, both of which cited *Crooker*. *Id.* at 1085-86; *see Audubon Soc. v. U.S. Forest Serv.*, 104 F.3d 1201, 1203-04 (10th Cir. 1997); *Schwaner*, 898 F.2d at 794. Only then did *Maricopa* proceed to consider, and reject, the more specific argument that the nest site data was exempt because it was "law enforcement" material. 108 F.3d at 1086-87. In sum, the instructive cases on Exemption 2 do not limit the class of exempt information to "law enforcement" materials alone. Therefore, finding information to be "law enforcement" material is a sufficient, but not necessary, condition to exemption under Exemption 2.

[10] We adopt the "predominantly internal" standard for several reasons. First, limiting Exemption 2 to "law enforcement" materials has no basis in either Supreme Court precedent or the statute. The Supreme Court in *Rose* does not use the phrase except in a footnote relating to a different FOIA exemption. Nor does the phrase "law enforcement" appear in the text of § 552(b)(2), which exempts matters "related solely to the internal personnel rules and practices of an agency." A proper standard would combine Congress's requirement that the material be related to "internal personnel rules and practices" and the Supreme Court's focus on the risk of circumvention of the law. *Crooker*'s standard properly reflects both.

As a matter of statutory interpretation, a definition of "internal personnel rules and practices" that rests solely on whether the information is "law enforcement" material makes little sense in light of the entire list of FOIA exemptions. "Under accepted canons of statutory interpretation, we must interpret statutes as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous." *Boise Cascade Corp. v. EPA*, 942 F.2d 1427, 1432 (9th Cir. 1991).

First, other provisions of FOIA indicate Congress was concerned with the disclosure of sensitive materials. Such materials will usually be, by their nature, predominantly internal. Exemption 1 covers information with a particular legal status —classified information. 5 U.S.C. § 552(b)(1). Exemptions 7(e) and (f) exempt law enforcement materials that, if disclosed, would risk circumvention of the law or place individuals in danger. *Id.* § 552(b)(7). These exemptions reflect a concern that much of an agency's internal information could be used by individuals with ill intent. It would be incongruent if FOIA protected sensitive information when it is contained in a classified or law enforcement document, but not when it is contained in a document developed predominantly for use by agency personnel. *Cf. Crooker*, 670 F.2d at 1065 ("It would be inconsistent to no small degree to hold that Exemption 2 would not bar the disclosure of investigatory techniques when contained in a manual restricted to internal use, but that

Exemption 7(E) would exempt the release of such techniques if contained in an 'investigatory record.' ").

Second, Exemption 7 protects "records or information compiled for law enforcement purposes." 5 U.S.C. § 552(b)(7). If Exemption 2 also covers *only* "law enforcement" materials, Exemption 7 is redundant. *See, e.g.*, *Gordon v. FBI*, 388 F. Supp. 2d 1028, 1036 (N.D. Cal. 2005) (discussing Exemptions 2 and 7 together, applying the same standards and reasoning to both). Moreover, Exemption 7 contains meaningful limitations on the use of law enforcement materials which are not present in Exemption 2. Exemption 7 protects "records or information compiled for law enforcement purposes," but only in certain situations, such as when disclosure would be expected to interfere with enforcement proceedings, deprive someone of a fair trial, or expose a confidential source. 5 U.S.C. § 552(b)(7). Applying a general "law enforcement materials" test under Exemption 2 renders meaningless the conditions that Congress has placed on non-disclosure of law enforcement materials under Exemption 7.

Congress has impliedly approved of *Crooker*'s approach. The Freedom of Information Reform Act of 1986, Pub. L. No. 99-570, subtit. N, 100 Stat. 3207, 3207-48 (1986), codified part of *Crooker* into Exemption 7. The legislative history of the Reform Act expressly states that the amended Exemption 7 was modeled after "the 'circumvention of the law' standard that the D.C. Circuit established in its en banc decision in *Crooker v. BATF*, 670 F.2d 1051 (D.C. Cir. 1981) (en banc) (interpreting Exemption 2)." S. Rep. No. 221-98, at 25 (1983). As the Seventh Circuit concluded in *Kaganove v. EPA*, "[b]ecause Congress saw fit to codify the very language of *Crooker*, and because nothing in the legislative history of the Reform Act suggests the slightest disagreement with that case's holding, we believe that *Crooker* accurately expresses congressional intentions." 856 F.2d 884, 889 (7th Cir. 1988), *cert. denied*, 488 U.S. 1011 (1989). Though this statutory history is not dispositive, it is certainly illustrative.

Finally, we note two practical considerations that favor adoption of the "predominantly internal" test. First, narrowing Exemption 2 to only "law enforcement" materials forces our courts to strain the term "law enforcement." *See, e.g.*, *Dirksen v. U.S. Dep't of Health and Human Servs.*, 803 F.2d 1456, 1459, 1461 (9th Cir. 1986) (Ferguson, J., dissenting) (accusing the panel majority of "judicial legislation" and "expand[ing] the concept of law enforcement" in holding that Medicare payment processing guidelines were "law enforcement" materials). *Hardy* did not define "law enforcement" and plainly contemplated a broad understanding of the term. 631 F.2d at 657 ("'Law enforcement' materials involve methods of enforcing the laws, *however interpreted* . . . ." (emphasis added)). Yet the term "law enforcement" must have some meaning and limit. *See Maricopa*, 108 F.3d at 1087 ("[N]o common-sense definition of the term suggests that goshawk nest-site information can be deemed 'law enforcement material' "). *Maricopa* carefully applied *Hardy* and suggested the limits of the term: whether the information "tell[s] the [agency] how to catch lawbreakers; [or tells] lawbreakers how to avoid the [agency's] enforcement efforts." *Id.*

Our existing cases lead our district courts to strain the logical limits of "law enforcement" to cover otherwise valid invocations of Exemption 2. They regularly deny requests for disclosure of all kinds of internal documents, including those related to the military and national security, even if unrelated to investigations or prosecutions. *See, e.g.*, *Kelly v. FAA*, No. 07-00634, 2008 WL 958037 (E.D. Cal. Apr. 8, 2008) (magistrate judge recommending exemption of "grading sheet" for hiring of Designated Pilot Examiners); *L.A. Times v. Dep't of Army*, 442 F. Supp. 2d 880, 898 (C.D. Cal. 2006) (holding data on insurgent and other attacks in Iraq are "law enforcement materials"); *Gordon*, 388 F. Supp. 2d at 1036 (holding "no fly" and other aviation watch lists are "law enforcement materials"); *Coastal Delivery Corp. v. U.S. Customs Serv.*, 272 F. Supp. 2d 958, 965 (C.D. Cal. 2003) (examining both *Hardy* and *Crooker* and holding data on the number of Customs inspections at a particular port constitute "law enforcement material"). If judges must regularly labor to apply the standard in order to fit their intuitive understanding of congressional intent, there is something wrong with the standard.

Our second practical concern stems from a preference for national uniformity. *Crooker* has become the authoritative case on Exemption 2. It presents an extraordinarily comprehensive analysis of the statutory language, legislative history, and caselaw. At least four of our sister circuits have adopted or relied on *Crooker*. *See Abraham & Rose, PLC v. United States*, 138 F.3d 1075, 1080 (6th Cir. 1998); *Audubon Soc.*, 104 F.3d at 1204; *Massey v. FBI*, 3 F.3d 620, 622 (2d Cir. 1993); *Kaganove*, 856 F.2d at 889. Bringing our circuit into alignment with the D.C. Circuit would create a more uniform standard for national agencies like the U.S. Navy. It would also allow our district courts to seek guidance from the D.C. Circuit's extensive case law in applying Exemption 2, in the absence of authoritative Ninth Circuit or Supreme Court rulings.

[11] In short, FOIA "resolved two crucial but potentially conflicting interests: the right of the citizenry to know what the Government is doing, and the legitimate but limited need for secrecy to maintain effective operation of Government." *Crooker*, 670 F.2d at 1062. The text and history of Exemption 2 indicate that Congress intended to prevent disclosure of personnel matters that are predominantly internal, regardless of whether they are "law enforcement" in nature. Limiting Exemption 2 to "law enforcement materials" would frustrate that policy while rendering Exemption 7 almost entirely superfluous. Adopting the "predominantly internal" standard gives due respect to Congress's policy choices. It also simplifies our approach to Exemption 2 and brings us into alignment with some of our sister circuits.

[12] Therefore, we hold that a personnel document is exempt as "High 2" if it is predominantly internal and its disclosure presents a risk of circumvention of agency regulation. Law enforcement materials, as defined in *Hardy* and *Maricopa*, satisfy these criteria. However, other sorts of materials —such as Navy data used for internal planning and safety purposes—may also meet the standard for exemption under Exemption 2. We now turn to the question of whether the ESQD information requested here satisfies these criteria.

IV

A

[13] We first consider whether the ESQD arcs fit within the statutory language— that is, whether they are "predominantly internal" personnel rules or practices. The ESQD arcs at issue here are essentially an extension of the OP-5 manual, which governs operations on NMII. As noted above, the Foreword to the manual states that "[t]he purpose of this volume is to acquaint personnel engaged in operations" involving explosives with the relevant procedures. The Foreword further states that "[t]he instructions and regulations prescribed in [the] OP-5 [manual] . . . are considered minimum criteria. The specific items, technical manuals, drawings, and specifications referenced in this publication should be consulted for additional, detailed requirements." ESQD arcs are one of the "specific items" referenced in the OP-5 manual. Therefore, the ESQD arcs constitute one part of the internal policies and procedures that NMII personnel are bound to follow when handling and storing explosive ordnance.

[14] Our understanding comports with the Navy's declarations that ESQD arcs are used by its personnel to "design, array, and construct ammunition storage facilities, and to organize ammunitions operations for risk mitigation and enhanced safety"—the very subjects of the OP-5 personnel manual. The ESQD data is indeed an integral part of the Navy's personnel practices. Like the ATF raid manual at issue in *Hardy* and *Crooker*, the information sought here is predominantly used for the internal purpose of instructing agency personnel on how to do their jobs.

Milner and the dissent suggest that the Navy should classify this information in order to keep it internal. However, not all internal information can be classified, for legitimate reasons of personal and national security. Classifying such information may present logistical challenges that could actually impede safe and effective operations. For instance, the Navy has occasionally shared ESQD information with civilian first responders around Port Townsend whose fire, rescue, and police services would be needed in the event of an accident or attack on NMII.

Milner further argues the decision to share the information with local officials means the information is not "internal." We disagree. The decision to share otherwise internal information with emergency responders does not necessarily place the information outside the bounds of Exemption 2. First, we do not wish to discourage agencies from sharing internal information with local first responders. Such cooperation encourages coordinated and effective mutual aid that improves safety for both government employees and citizens. Agencies must be permitted to grant limited, confidential access to other federal and local agencies without risking broader disclosure. Second, limited disclosure for official purposes does not violate the standard that information must be "*predominantly* internal." Of course, if an agency regularly and publicly discloses its practices, it can no longer claim the information is predominantly internal. That is not the case here. The ESQD arcs are "predominantly internal," regardless of prior limited disclosure to local officials.

Finally, FOIA's fundamental concern with the existence of "secret law" is not implicated here. *See Hardy*, 631 F.2d at 657 (stating that administrative materials, which "involve the definition of the violation and the procedures required to prosecute the offense, . . . contain the 'secret law' which was the primary target of [FOIA's] broad disclosure provisions"). When internal personnel practices are used as "a source of 'secret law,' as important to the regulation of public behavior as if they had been codified," we cannot say the information is predominantly internal. *Crooker*, 670 F.2d at 1075 (discussing the guidelines for prosecutorial discretion at issue in *Scott v. United States*, 419 F.2d 264, 277 (D.C. Cir. 1969)); *Hardy*, 631 F.2d at 657. Even if the information sought was developed for purely internal uses, we could not permit invocation of Exemption 2 if the information had external legal effect.

[15] In this case, the personnel procedures derived from ESQD arcs are certainly not written to regulate the public. The ESQD arcs have absolutely no legal or enforcement ramifications whatsoever on the citizens of the Puget Sound region. Nothing about the data even *could* be codified in any logical way to regulate public behavior, and the Navy has not attempted to do so. We therefore hold the requested ESQD information is "predominantly internal."[4]

B

We next turn to the question whether disclosure of the ESQD information "may risk circumvention of agency regulation." Rose, 425 U.S. at 369; *see Crooker*, 670 F.2d at 1070 (exempting ATF raid manual because disclosure risked "circumvention of the law"). In *Rose*, the Supreme Court surveyed the House and Senate reports related to Exemption 2 in considering the scope of the exemption. 425 U.S. at 362-67.[5] The Court noted the House Report's emphasis on preventing circumvention of agency regulation and discussed prior cases relying on this Report:

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[4] The dissent does not dispute that the requested materials satisfy Exemption 2's "predominantly internal" requirement.

[5] The Court ultimately chose to rely on the Senate Report in determining Congress' intent in resolving the question at issue in *Rose*. 425 U.S. at 367.

> Those cases relying on the House, rather than the Senate, interpretation of Exemption 2, and permitting agency withholding of matters of some public interest, have done so only where necessary to prevent the circumvention of agency regulations that might result from disclosure to the subjects of regulation of the procedural manuals and guidelines used by the agency in discharging its regulatory function.

Id. at 364. However, because *Rose* was not a case "where knowledge of administrative procedures might help outsiders to circumvent regulations or standards," *id.* (quotation omitted), the Court left open the question whether Exemption 2 would apply "where disclosure may risk circumvention of agency regulation," *id.* at 369.

Building on this framework, *Crooker* addressed the general question whether "Exemption 2 might be construed to cover internal agency materials where disclosure might risk circumvention of the law." 670 F.2d at 1067. It concluded, "we hold that . . . if disclosure significantly risks circumvention of agency regulations or statutes, then Exemption 2 exempts the material from mandatory disclosure." *Id.* at 1074. Five years later, the D.C. Circuit again summarized the scope of the circumvention requirement:

> [W]e have not limited the "high 2" exemption to situations where penal or enforcement statutes could be circumvented. Rather, we have held that "[w]here disclosure of a particular set of documents would render those documents operationally useless, the *Crooker* analysis is satisfied whether or not the agency identifies a specific statute or regulation threatened by disclosure."

Schiller, 964 F.2d at 1208 (quoting *Nat'l Treasury Employees Union v. U.S. Customs Serv.*, 802 F.2d 525, 530-31 (D.C. Cir. 1986)).

[16] In cases following *Crooker*, courts have exempted information that would aid individuals in thwarting various kinds of rules, procedures, and statutes.[6] *See Massey*, 3 F.3d at 622 (exempting "redact[ed] internal FBI notations containing the name of an FBI agent, the initials of other FBI employees, and certain administrative markings"); *PHE, Inc. v. Dep't of Justice*, 983 F.2d 248, 251 (D.C. Cir. 1993) (exempting "specific documents, records and sources of information available to Agents investigating obscenity violations" because "release of FBI guidelines as to what sources of information are available to its agents might encourage violators to tamper with those sources of information"); *Schiller*, 964 F.2d at 1208 (exempting documents containing the National Labor Relations Board's litigation strategies in Equal Access to Justice Actions); *Kaganove*, 856 F.2d at 889-890 (exempting EPA document used to rate job candidates); *Dirksen*, 803 F.2d at 1458-59 (exempting guidelines used for processing Medicare payment claims); *Nat'l Treasury Employees Union*, 802 F.2d at 530-31 (exempting "crediting plans" used to evaluate job applicants); *Founding Church of Scientology v. Smith*, 721 F.2d 828, 829, 831 (D.C. Cir. 1983) (affirming district court's judgment that disclosure of "administrative handling instructions" "would risk circumvention of federal statutes").

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[6] The dissent refers to "a consistent line of cases in which agency maps have been held not to qualify under Exemption 2." Dissent at 10381. We concede that the maps at issue in the cited cases were deemed non-exempt. However, the fact that the information at issue was expressed in the form of a map is utterly irrelevant to our analysis. A map may or may not meet the standard for Exemption 2; it will depend, in each case, on what information the map conveys and the purpose for which it is used. Even under the dissent's narrow reading of the circumvention requirement, a map might well facilitate circumvention by a regulated person or entity. For instance, a map or diagram showing the location of cameras in a prison would be of great interest to an inmate who wishes to avoid detection when he violates prison regulations. We decline to draw distinctions based on whether the information appears in images, numbers, words, or any other format.

[17] The record before us reveals that the ESQD information falls squarely within this class of cases. An agency must "submit to the district court a detailed affidavit describing how disclosure would risk circumvention of agency regulation." *Hardy*, 631 F.2d at 657 (relying on *Cuneo v. Schlesinger*, 484 F.2d 1086, 1092 (D.C. Cir. 1973)). "If the explanation is reasonable, the district court should find the materials exempt from disclosure, unless in camera examination shows that they contain secret law or that the agency has not fairly described the contents in its affidavit." *Id.* (citing *Cox v. U.S. Dep't of Justice*, 576 F.2d 1302, 1311-12 (8th Cir. 1978)).

[18] The Navy has described in detailed affidavits precisely how public disclosure would risk circumvention of the law— the ESQD arcs sought here point out the best targets for those bent on wreaking havoc. The arcs indicate specific blast ranges for individual magazines within NMII. A terrorist who wished to hit the most damaging target or a protestor who wished to disrupt the Navy's monitoring and transportation protocols would be greatly aided by such information.[7] The dissent does not apparently dispute that this risk exists; it concludes only that risking sabotage of military explosives is not the sort of "circumvention of the law" that should concern us.

[19] As in *National Treasury Employees Union*, disclosure of the ESQD data "would quickly render those documents obsolete for the purpose for which they were designed." 802 F.2d at 530. The ESQD arcs are created as a planning tool to prevent catastrophic detonations; disclosing the arcs would make catastrophe more likely. The fact that requests for similar information from the Bangor nuclear submarine base have been granted is irrelevant to our analysis. "[T]he release of certain documents waives FOIA exemptions *only for those documents released.*" *Mobil Oil Corp. v. EPA*, 879 F.2d 698, 701 (9th Cir. 1989). Moreover, Commander Whitbred explicitly addressed this argument in his affidavit: "[NMII] is not a submarine base. The nature of its mission is completely different, as are its security parameters, and physical characteristics. Furthermore, [NMII] is not a single-weapon system facility such as the bases referenced where the risks are associated with a single program." Because the Navy's safety concern rests on the potential utility of the ESQD arcs in identifying the most hazardous target among many, these distinctions are significant. *Hardy* and *Minier* instruct us to accord substantial weight to these reasonable explanations. *Hardy*, 631 F.2d at 657; *Minier*, 88 F.3d at 800.

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[7] Milner's argument that such acts of sabotage are already criminalized is unavailing. The same is equally true for misdeeds involving drugs and firearms, but *Hardy* and *Crooker* nonetheless concluded that criminals should not have the benefit of inside information in frustrating an ATF raid. *Hardy*, 631 F.2d at 656; *Crooker*, 670 F.2d at 1073.

[20] The Navy released roughly 1,000 documents responsive to Milner's requests. It withheld the narrow class of documents at issue here because, as Commander Whitbred put it, "I believe strongly that release of the sensitive ESQD information involved in this case would jeopardize the safety and security of the storage, transportation, and loading of ammunitions and explosives" (emphasis original). There is no basis to "suspect" that the Navy has ulterior, political motives for denying the requested information. *See* Dissent at 10385. The Navy has met its burden of describing how disclosure would risk circumvention of its regulations. Therefore, the district court properly exempted the requested ESQD information from disclosure.[8]

V

In conclusion, we reiterate our approach to Exemption 2. First, the material withheld must fall within the terms of the statutory language. To determine whether a personnel document falls within the statutory language, we inquire whether it is "predominantly internal." Law enforcement material, as defined in *Hardy* and *Maricopa*, qualifies as predominantly internal, but it is not the only category of materials that may meet this test. Second, if the material is predominantly internal, the agency may defeat disclosure by proving that disclosure may risk circumvention of the law. The ESQD arcs requested here are predominantly internal personnel materials, and if disclosed would present a serious risk of circumvention of the law. The district court properly ruled that the information sought is exempt from FOIA disclosure.

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[8] Because we conclude the requested information was properly exempted under Exemption 2, we need not reach the alternative argument that Exemption 7 also applies.

AFFIRMED.

W. FLETCHER, Circuit Judge, dissenting:

The question in this case is whether Explosive Safety Quantity Distance ("ESQD") arc maps are exempt from disclosure under the Freedom of Information Act ("FOIA"). The Navy claims the maps are exempt under FOIA Exemption 2 and Exemption 7(F). Exemption 2 covers information "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2). Exemption 7(F) covers "records or information compiled for law enforcement purposes" that, if disclosed, "could reasonably be expected to endanger the life or physical safety of any individual." *Id.* § 552(b)(7)(F). The majority holds that ESQD maps are exempt under Exemption 2. It does not reach Exemption 7(F).

The majority's holding is inconsistent with both the statute and the uniform case law interpreting Exemption 2. I would hold that the ESQD maps are not exempt under either FOIA Exemption 2 or Exemption 7(F).

I. Background

Naval Magazine Indian Island ("NMII") is an ordnance storage depot located on the northwest side of Indian Island on Port Townsend Bay in Washington State. The bay is on the northeast corner of the Olympic Peninsula, where the Straits of Juan de Fuca come in from the Pacific Ocean to meet Puget Sound. The bay is used by many kinds of pleasure and work boats. The northern part of NMII is a little more than two miles southeast of the town of Port Townsend across the open water of the bay, and several hundred feet west of Fort Flagler State Park on nearby Marrowstone Island. The southern part of NMII is a little more than a mile east of the towns of Port Hadlock and Irondale across the open water of the bay. NMII is used to store and transship ammunition, weapons, weapon components and explosives for the Navy, U.S. Joint Forces, Homeland Security and other federal agencies and allied forces. The Navy is responsible for all operations on NMII.

Glen Scott Milner is a life-long resident of the Puget Sound region. For the past twenty years he has done research and written about explosive hazards related to Navy activities in Puget Sound. He has published articles in the Bulletin of Atomic Scientists, BASIC (British American Security Information Council, in London), Seattle Times, Seattle Post-Intelligencer, Kitsap Sun, Port Townsend Leader, Washington Free Press, and Real Change in Seattle. In addition, numerous radio and television shows and newspaper articles have featured his comments about local Navy activities or used information that he obtained through FOIA.

The Navy develops ESQD arc maps as part of its explosives safety program. On an arc map,[1] an hypothesized explosion is at the focus of the arc. The arc represents the distance at which the force of the explosion will be felt. The distance between the site of the explosion and the arc varies depending on the kind and quantity of ordnance. ESQD arc maps are essentially safety maps, telling the Navy (and anyone else who is allowed to see them) not only where different kinds and quantities of ordnance should be stored, but also how far away people and structures should be located to ensure their safety in the event of an explosion.

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[1] When I refer to ESQD arc maps, I refer not only to the maps but to the mathematical calculations of which the maps are the graphic representation.

Milner submitted two FOIA requests to the Navy, one on December 7, 2003, and the other on February 3, 2004, for information about explosion hazards at NMII. The district court found Milner's two requests "substantially identical" and treated them as a single FOIA request. Milner requested three kinds of documents:

> [1] [A]ll documents on file regarding ESQD arcs or explosive handling zones at the ammunition depot at Indian Island. This would include all documents showing impacts or potential impacts of activities in the explosive handling zones to the ammunition depot and the surrounding areas[;] . . .
>
> [2] all maps and diagrams of the ammunition depot at Indian Island which show ESQD arcs or explosive handling zones"[;] [and]
>
> [3] documents regarding any safety instructions or operating procedures for Navy or civilian maritime traffic within or near the explosive handling zones or ESQD arcs at the ammunition depot at Indian Island.

The Navy identified seventeen document packages totaling about 1,000 pages that met Milner's request. The Navy disclosed most of these documents to Milner, but withheld 81 documents, claiming that their disclosure could threaten the security of NMII and the surrounding community.

Jefferson County Commissioner Phil Johnson states in a declaration that he wrote two letters to Rear Admiral W.D. French requesting a meeting between Navy officials and the general public concerning safety of ordnance storage and handling at NMII. Jefferson County encompasses the towns of Port Townsend, Port Hadlock and Irondale. In his first letter, dated February 21, 2006, Commissioner Johnson recounted that Captain Kurtz, the then-Commanding Officer of NMII, and his staff had provided a tour of NMII to "local governmental leaders and the press." He wrote, "The three hours that we spent touring the facilities and listening to the presentations about the Magazine's safety record, the 'standard operating procedures' and the Navy's environmental program were indeed impressive." Commissioner Johnson then proposed a discussion lasting one to two hours at Fort Worden State Park "with our general public, Captain Kurtz and his staff," and with a "neutral facilitator who will keep the audience focused on the purpose of the meeting." Admiral French wrote back thanking Commissioner Johnson for his "support of the U.S. Navy," stating that "the Navy values its outstanding relationship with Jefferson County," and describing meetings Captain Kurtz had had with different groups, including the Chambers of Commerce of Port Hadlock and Port Townsend. However, Admiral French did not mention Commissioner Johnson's proposal for a general public meeting.

In a second letter to Admiral French, dated April 3, 2006, Commissioner Johnson again requested a general public meeting. This time he proposed that an "open public forum" be held at the Jefferson County Courthouse. He proposed that Captain Kurtz and his staff appear on a panel with "panelists from the Hospital, Emergency Operations and Law Enforcement/Fire." He again proposed that there be a "neutral moderator, who we will provide, to insure that the forum remains focused on NAV MAG Indian Island and the plans for the island." This time, Admiral French responded to Commissioner Johnson's proposal. He declined, writing on May 3, 2006:

> Thank you for your letter . . . in which you propose that a public forum be held . . . with presentations by the Navy, the local hospital, your Emergency Operations Department, Law Enforcement and the East Jefferson Fire District. While we appreciate this opportunity and desire to keep the lines of communication open, we prefer to continue our current outreach program.

Admiral French listed occasions on which Captain Kurtz had spoken to "many community groups and civic organizations in the Port Townsend area." He stated, "We believe that these public engagements have been quite successful in providing information to the citizens of Jefferson County."

On September 11, 2006, Milner sued the Navy under FOIA seeking disclosure of the documents the Navy had refused to provide in response to his FOIA request.

Commander George Whitbred IV, the current Commanding Officer of NMII, states in a declaration filed in this suit that ESQD arcs "define minimum separation distances for quantities of explosives based on required degrees of protection. These separation distances are established to afford reasonable safety to Department of Navy shore activities, and, to the extent possible, protect adjacent public and private property." Commander Whitbred states that "ESQD arcs can be 'reverse engineered' with the right information," and that "some arcs reveal more than others about the particular ammunition, explosive or weapons system." He states that arc maps are provided to civilian members of the public on a "case-by-case basis." Commander Whitbred states further:

> We sometimes share ESQD information with "first responders" at both Jefferson County and the City of Port Townsend. However, ESQD information is not released to the general public if a determination is made that the release might pose a serious threat of

> death or injury to any person — either inside or outside the installation boundaries.

Milner states in a declaration that the Navy submarine base at Bangor, Washington, "handles much of the ammunition that is sent to Indian Island. The ammunition is routed by rail cars and then sent by truck to Indian Island." He further states that the Navy has voluntarily handed over to him, pursuant to FOIA requests, comparable arc maps for ordnance stored at the Bangor base. The Navy's behavior with respect to the arc maps for the Bangor base contrasts sharply with its behavior with respect to the arc maps for NMII, even though the same type of ordnance is stored at both bases. Milner states:

> Numerous documents showing ESQD arcs and related information about the Bangor base, similar to the documents I requested for Indian Island, have been released to me through FOIA. One 1995 document . . . lists 33 different sites with ESQD arcs at Naval Base Kitsap-Bangor. The Net Explosives Weight at these sites is listed from 5,000 to 3.72 million pounds . . . . The document also contains a map showing ESQD arcs at Bangor. Numerous similar maps showing ESQD arcs at Bangor have been released to me in the past.

Bangor is the Puget Sound base for the Navy's Trident nuclear submarines. The Bangor base is located on the northeastern shore of Hood Canal, a little less than 40 miles due south of Port Townsend. Despite its name, Hood Canal is not a canal; rather, it is a long narrow inlet of Puget Sound mostly running north and south along the eastern edge of the Olympic Peninsula. The nearest town to the Bangor base is Silverdale, four or five miles across land to the south.

The Navy has not contradicted Milner's statement about the nature and quantity of ordnance at Bangor. Nor has it contradicted his statement that it has voluntarily released to him under FOIA numerous are maps for the ordnance stored at the Bangor base. Though it undoubtedly could have done so, the Navy has not provided affidavits or declarations from anyone connected with the Bangor base. Commander Whitbred of NMII has provided the Navy's only response to Milner's statements about the Bangor base. He states in his declaration, "I am not an expert on Trident Submarines; nor do I know the reasons why information about ESQD arcs might have been released by those commands in the past."

Both parties moved for summary judgment. The Navy contended that the documents were protected from disclosure under FOIA Exemptions 2 and 7(F). The district court granted summary judgment to the Navy under Exemption 2. The court did not address Exemption 7(F). Milner timely appealed.

II. Discussion

I would hold that neither Exemption 2 nor Exemption 7(F) permits the Navy to withhold the requested ESQD arc maps.

A. FOIA

The goal of FOIA is "to open agency action to the light of public scrutiny." *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 772 (1989) (internal quotation omitted). FOIA revised § 3 of the Administrative Procedure Act ("APA"), which Congress had declared was "full of loopholes which allow agencies to deny legitimate information to the public." S. Rep. No. 813, 89th Cong., 1st Sess., 3 (1965) ("Senate Report"); *see also* H.R. Rep. No. 1497, 89th Cong., 2d Sess., 4 ("House Report") ("Section 3 of the [APA], though titled 'Public Information' and clearly intended for that purpose, has been used as an authority for withholding, rather than disclosing, information."). In the words of the Supreme Court, "Section 3 was generally recognized as falling far short of its disclosure goals and came to be looked upon more as a withholding statute than a disclosure statute." *Dep't of Air Force v. Rose*, 425 U.S. 352, 360 (1976) *(quoting EPA v. Mink*, 410 U.S. 73, 79 (1973)).

FOIA mandates that government agencies disclose their records through three methods. 5 U.S.C. § 552(a). Section 552(a)(1) requires that agencies publish certain information in the Federal Register. Section 552(a)(2) requires that certain other types of material be made available for public inspection and copying. Section 552(a)(3), upon which Milner relies, requires disclosure of all other reasonably described records not already released under § 552(a)(1) or (a)(2).

Federal agencies may withhold requested documents only if they fall under one of the nine enumerated exemptions to mandatory disclosure under FOIA. Exemptions under FOIA "must be narrowly construed." *Rose*, 425 U.S. at 361. Exemptions under FOIA are also "explicitly exclusive." *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 151 (1989) (quoting *FAA Adm'r v. Robertson*, 422 U.S. 255, 262 (1975)). That is, we may not read additional exemptions into FOIA, no matter how desirable such exemptions might be in the view of the agency or the court. *See also Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 7-8 (2001); *Maricopa Audubon Soc'y v. U.S. Forest Serv.*, 108 F.3d 1082, 1085 (9th Cir. 1997). The existence of these nine enumerated exemptions "do[es] not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Rose*, 425 U.S. at 361.

B. FOIA Exemption 2

FOIA Exemption 2 allows agencies to withhold "matters . . . related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2). The question before us is whether ESQD arc maps are "related solely to internal personnel rules and practices" within the meaning of Exemption 2. I would hold that they are not.

I agree with part of the majority's analysis. I agree that we should adopt the reasoning of the D.C. Circuit articulated in *Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051 (D.C. Cir. 1981) (en banc). I further agree that our circuit's three decisions dealing with Exemption 2 — *Hardy v. Bureau of Alcohol, Tobacco & Firearms*, 631 F.2d 653 (9th Cir. 1980); *Dirksen v. United States Department of Health and Human Services*, 803 F.2d 1456 (9th Cir. 1986); and *Maricopa Audubon Society v. United States Forest Service*, 108 F.3d 1082 (9th Cir. 1997) — are not inconsistent with *Crooker*. Finally, I agree that under *Crooker*, documents must be "predominantly internal" and pertain to "personnel rules and practices of an agency" to qualify under Exemption 2.

However, I strongly disagree with the majority's application of the part of *Crooker* that deals with what it calls "the circumvention requirement." Maj. Op. at 10366. *Crooker* held that a predominantly internal document whose release might result in the circumvention of agency regulation is protected under Exemption 2. Circumvention of agency regulation has a precise, and restricted, meaning. *Crooker* and all subsequent cases have held that the circumvention must be by a person or entity that is subject to regulation by the agency in question.

Crooker carefully described the sort of circumvention of agency regulation that qualifies a document for exemption under Exemption 2. *Crooker* noted that the Supreme Court's opinion in *Rose* had left open the question whether documents that would permit circumvention of regulation were exempted by Exemption 2. *Crooker* answered the question, holding that such documents were exempted. It quoted from *Rose* to make clear the sort of circumvention at issue. First, the Court in *Rose* had referred to Exemption 2 as being potentially available

> only where necessary to prevent the *circumvention of agency regulations* that might result from *disclo-*

> *sure to the subjects of regulation* of the procedural manuals and guidelines used by the agency in discharging its regulatory function.

Crooker, 670 F.2d at 1066 (quoting *Rose*, 425 U.S. at 364) (emphasis altered). Second, the Court had noted that the primary focus of the House Report on Exemption 2 had been on "exemption of *disclosures that might enable the regulated to circumvent agency regulation*." *Crooker*, 670 F.2d at 1066 (quoting *Rose*, 425 U.S. at 366-67) (emphasis added). Thus, under *Crooker*, agency documents embodying "personnel rules and practices" are exempt under Exemption 2 only when they are "procedural manuals and guidelines used by the agency in discharging its regulatory function," and only when their disclosure "to the subjects of regulation" might result in the "circumvention of agency regulations." *Crooker*, 670 F.2d at 1066 (quoting *Rose*, 425 U.S. at 364).

Examples of documents whose release might result in circumvention of agency regulation by regulated persons or entities include "instructions to such government officials as investigators and bank examiners." *Crooker*, 670 F.2d at 1057. The documents we held exempt under Exemption 2 in *Hardy* and *Dirksen* are further examples of such documents. In *Hardy*, we held exempt under Exemption 2 a Bureau of Alcohol, Tobacco, and Firearms ("BATF") training manual whose disclosure risked circumvention of BATF regulation by parties subject to that regulation. In *Dirksen*, we held exempt under Exemption 2 a document containing Medicare processing Guidelines whose disclosure risked circumvention of agency reimbursement regulations by Medicare providers subject to Health and Human Services regulation. In *Hardy*, we emphasized that the BATF manual was a law enforcement manual, and in *Dirksen*, we analogized the Guidelines document to a law enforcement manual.

In a consistent line of cases decided after *Crooker*, the D.C. Circuit has restricted the application of Exemption 2 to documents whose release would permit the subjects of the agency's regulation to circumvent that regulation. In *National Treasury Employees Union v. United States Customs Service*, 802 F.2d 525 (D.C. Cir. 1986), the court held that the Customs Service could withhold "crediting plans" it used to evaluate job applicants. *Id.* at 531. The court determined that "release of the plans creates a significant risk that the Service's applicant evaluation program will be seriously compromised" because "advance knowledge of the plans by applicants would allow and induce at least some of them to embellish—or perhaps even fabricate—their backgrounds to suit the appropriate crediting plan." *Id.* at 529.

In *Schiller v. NLRB*, 964 F.2d 1205 (D.C. Cir. 1992), the court similarly allowed the National Labor Relations Board ("NLRB") to withhold documents containing the agency's litigation strategies in Equal Access to Justice Act ("EAJA") actions. *Id.* at 1207. The EAJA allows prevailing parties to recover attorney's fees and costs from the agency in certain circumstances. *See* 5 U.S.C. § 504. The court held that requiring the NLRB to disclose its litigation strategies would "compromis[e] the Board's ability to defend itself in EAJA actions." 964 F.2d at 1208.

In *PHE, Inc. v. United States Department of Justice*, 983 F.2d 248 (D.C. Cir. 1993), the court allowed the FBI to claim Exemption 2 for the section of its Manual of Investigative Operations and Guidelines related to interstate transportation of obscene matter. *Id.* at 251. This withheld section "detailed specific documents, records and sources of information available to Agents investigating obscenity violations, as well as the type of patterns of criminal activity to look for when investigating certain violations." *Id.* The court agreed with the government that the disclosure of this portion of the Manual would "provide[ ] violators with an opportunity to impede lawful investigations." *Id.*

The case law in other circuits is consistent with that of the D.C. Circuit. In *Caplan v. Bureau of Alcohol, Tobacco &*

Firearms, 587 F.2d 544 (2d Cir. 1978), the Second Circuit held exempt under Exemption 2 a BATF Raids and Searches training manual. *Id.* at 546. The court stated that releasing the manual would "significantly assist those engaged in criminal activity by acquainting them with the intimate details of the strategies employed in its detection." *Id.* at 547. The Seventh Circuit followed suit in *Kaganove v. EPA*, 856 F.2d 884 (7th Cir. 1988), holding exempt under Exemption 2 an EPA document used to rate job candidates. *Id.* at 889-90. The court found that disclosing the document would allow job applicants to exaggerate their credentials to receive higher ratings. *Id.* at 890.

The majority does not acknowledge the limited sense in which circumvention of agency regulation is used in the case law interpreting Exemption 2. The majority has cited no case — and can cite no case — in which Exemption 2 was applied more broadly than in the cases I have just described. In all of the reported cases dealing with the issue, Exemption 2 applies only to documents whose release would facilitate circumvention of agency regulation by a regulated person or entity. Under long-standing and well-established law, a document is protected under Exemption 2 only if its release risks circumvention *by a regulated person or entity*. Exemption 2 does not apply in this case because there is no such person or entity. The Navy is not acting as a regulatory or law enforcement agency, and the arc maps do not regulate anyone or anything outside the Navy itself.

The majority ignores a consistent line of cases in which agency maps have been held not to qualify under Exemption 2. Most important is our own case, *Maricopa Audubon Society v. United States Forest Service*, 108 F.3d 1082 (9th Cir. 1997), in which we held that Forest Service maps showing the locations of goshawk nests were not protected from disclosure under Exemption 2. 108 F.3d at 1086-87. We so held despite the concern expressed by the district court that if the maps fell into the wrong hands harm to the goshawks could result. *Id.* at 1084.

Other cases include *Audubon Society v. United States Forest Service*, 104 F.3d 1201 (10th Cir. 1997), *Living Rivers, Inc. v. United States Bureau of Reclamation*, 273 F. Supp. 2d 1313 (D. Utah 2003), and *DeLorme Publishing Co. v. National Oceanic & Atmospheric Administration of the United States Department of Commerce*, 917 F. Supp. 867 (D. Me. 1996). In *Audubon*, the Tenth Circuit held that maps identifying Mexican spotted owl nest sites were not protected from disclosure under Exemption 2. 104 F.3d at 1204. In *Living Rivers*, the district court determined that the Bureau of Reclamation could not withhold maps showing which downstream areas would be flooded if the Hoover Dam or the Glen Canyon Dam failed. 272 F. Supp. 2d at 1318. The court so held despite the government's contention that releasing the maps "would [compromise] dam security and the security of the surrounding populations." *Id.* at 1315. In *DeLorme*, the district court rejected the National Oceanic and Atmospheric Administration's attempt to withhold compilations of its nautical charts from disclosure under Exemption 2. 917 F. Supp. at 876.

The key question in these cases was not whether the documents at issue were maps per se, but rather the consequence of the release of the maps. Even though there was some potential risk of harm from the release of the maps, their release did not risk circumvention of regulation by regulated persons or entities. I agree with the majority that releasing a map showing the location of cameras in a prison would be protected under Exemption 2. *See* Maj. Op. at 10367 n.6. Such a map would be protected because its disclosure would risk circumvention of regulation by regulated persons, i.e. by the prison's inmates. But our case is quite different. In our case, there is — at least, according to the Navy — a risk of harm from release of the maps. But the risk is not that a regulated person or entity will be thereby assisted in avoiding the agency's regulation.

Given the foregoing extensive and consistent lines of precedent, the conclusion is inescapable that the arc maps at issue in this case are not exempt under Exemption 2. The ESQD arc maps do not qualify for Exemption 2 under this circuit's analysis in *Hardy* and *Dirksen*; under the D.C. Circuit's analysis in *Crooker* and subsequent cases; or under the analyses of the other circuits. The arc maps are not "procedural manuals [or] guidelines used by the agency in discharging its regulatory function" whose disclosure "to the subjects of regulation" might result in the "circumvention of agency regulations." *Crooker*, 670 F.2d at 1066. Rather, the maps fall squarely under the analysis in our circuit's decision in *Maricopa*, in the Tenth Circuit's decision in *Audubon*, and in the district courts' decisions in *Living Rivers* and *DeLorme*. I would therefore hold that the ESQD arc maps at issue in this appeal are not exempt under Exemption 2.

C. FOIA Exemption 7(F)

Because I would hold that the ESQD arc maps are not exempt under Exemption 2, I would also reach the question whether the maps are exempt under Exemption 7(F). Exemption 7(F) covers "matters that are . . . records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to endanger the life or physical safety of any individual." 5 U.S.C. § 552(b)(7)(F). I would hold that the ESQD arc maps are not covered under Exemption 7(F) because they were not "compiled for law enforcement purposes."

The Navy has the burden of proving that it is a "law enforcement" agency and that the ESQD arc maps were "compiled for law enforcement purposes." *Church of Scientology of Cal. v. U.S. Dep't of the Army*, 611 F.2d 738, 748

(9th Cir. 1980). An agency with a " 'mixed' function, encompassing both administrative and law enforcement functions, must demonstrate that it had a purpose falling within its sphere of enforcement authority in compiling the particular document." *Id.* A law enforcement purpose is an "adjudicative or enforcement purpose[ ]," such as the "enforcement of any statute or regulation within the authority" of the agency. *Id.* "Information need not have been originally compiled for law enforcement purposes in order to qualify for the 'law enforcement' exemption, so long as it was compiled for law enforcement purposes at the time the FOIA request was made." *Lion Raisins v. U.S. Dep't of Agric.*, 354 F.3d 1072, 1082 (9th Cir. 2004) (quoting *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 155 (1989)).

The Navy concedes that it is an agency with a mixed function. Therefore, it must demonstrate that it "had a law enforcement purpose based upon properly delegated enforcement authority" for compiling the ESQD arc maps. *Church of Scientology*, 611 F.2d at 748. The Navy does not meet this standard. Agencies with law enforcement powers have the ability to conduct investigations or adjudications to enforce laws or regulations. *See, e.g.*, *Church of Scientology Int'l v. I.R.S.*, 995 F.2d 916, 919 (9th Cir. 1993) (finding that the Exempt Organization Division of the IRS performs a law enforcement function "by enforcing the provisions of the federal tax code that relate to qualification for tax exempt status"); *Lewis v. I.R.S.*, 823 F.2d 375, 379 (9th Cir. 1987) (holding that the I.R.S. has a law enforcement purpose in the context of a criminal tax investigation); *Binion v. U.S. Dep't of Justice*, 695 F.2d 1189, 1194 (9th Cir. 1983) (stating that the F.B.I. has a "clear law enforcement mandate"). The divisions of the Navy responsible for producing ESQD arc maps and conducting operations on NMII have no such powers. These divisions are distinct from those with investigative powers, such as the Naval Investigative Service of the Office of Naval Intelligence, which we examined in *Church of Scientology*. 611 F.2d at 748.

Even if the branch of the Navy that created the ESQD arc maps had law enforcement authority, these documents were not compiled for law enforcement purposes. Commander Whitbred stated that the Navy "use[s] these arcs to design, array, and construct ammunition storage facilities, and to organize ammunition operations for risk mitigation and enhanced safety." This is not an "adjudicative or enforcement purpose[ ]." *Church of Scientology*, 611 F.2d at 748. I would therefore hold that the ESQD arc maps at issue in this appeal are not exempt under Exemption 7(F).

D. FOIA Exemption 1

I am myself a former Navy officer. I yield to no one in my admiration for the care and professionalism of the Navy in its handling of ordnance, at NMII and elsewhere.

There is reason to suspect that the Navy's reluctance to release the ESQD arc maps for NMII is not based on the danger to national security that might be posed if the arc maps were released to Milner and the general public, but rather on the political difficulties that might be created by their release. This is strongly suggested by the contrast between the Navy's behavior with respect to the arc maps for the Bangor base and its behavior with respect to comparable arc maps for NMII. The Navy voluntarily provided to Milner under FOIA numerous ESQD arc maps for the Bangor base. That base is located four to five miles across land from the nearest town. So far as the record reveals, there was little political sensitivity to the possible dangers posed by the storage of conventional ordnance at Bangor.

By contrast, the Navy has been unwilling to provide to Milner the comparable ESQD arc maps for the same type of ordnance stored at NMII. NMII is located a little more than two miles across open water from Port Townsend and a little more than a mile across open water from Port Hadlock and Irondale. It is clear from the record that there is substantial political sensitivity to the possible danger posed by the storage of ordnance at NMII. This political sensitivity is shown, for example, by Jefferson County Commissioner Johnson's invitation to the Navy to appear at a public forum to discuss "NAV MAG Indian Island and the plans for the island" on a panel with local hospital, emergency operations, law enforcement and fire fighting personnel. The nature of the Navy's response is shown by its unwillingness to accept the invitation, and its preference instead to continue to conduct its "current outreach program" in which Captain Kurtz, appearing alone, spoke to various community groups and civic organizations.

Commander Whitbred states in his declaration that a person may be able to "reverse engineer" ESQD arc maps, and thereby to discover information about "particular ammunition, explosive[s and] weapons systems," with possible adverse consequences for national security. I have trouble reconciling Commander Whitbred's statement about the national security risks of releasing the ESQD arc maps for NMII with the Navy's failure to classify these maps. Exemption 1 of FOIA specifically exempts from disclosure classified matters "kept secret in the interest of national defense or foreign policy." 5 U.S.C. § 552(b)(1). This exemption is specifically designed to allow government agencies to withhold information that might jeopardize our national security. If the disclosure of the ESQD arc maps is as dangerous as Commander Whitbread claims, the Navy is acting irresponsibly by not classifying them. I would be willing to remand to the district court, even at this late stage in the litigation, in order to give the Navy an opportunity to classify the arc maps at NMII and thereby to qualify them under Exemption 1 if it truly believes that Commander Whitbred's stated concerns about reverse engineering are legitimate. But my colleagues in the majority have declined to follow this course.

Conclusion

FOIA is a careful "balance between the interests of the public in greater access to information and the needs of the Government to protect certain kinds of information from disclosure." *John Doe Agency*, 493 U.S. at 157. FOIA protects information that, if released, would jeopardize our national security or endanger the lives of individuals. Such information is protected under Exemption 1 if it is classified and under Exemption 7(F) if it is "compiled for law enforcement purposes" and "could reasonably be expected to endanger the life or physical safety of any individual" if disclosed. The majority's determination to expand Exemption 2 to protect information that the Navy has not seen fit to classify distorts Congress's careful balance and defies the Supreme Court's instruction that FOIA exemptions "must be narrowly construed" and are "explicitly exclusive." *Rose*, 425 U.S. at 361; *Tax Analysts*, 492 U.S. at 151 (quoting *Robertson*, 422 U.S. at 262).

I conclude, based on a long line of consistent precedent in this and other circuits, that neither Exemption 2 nor Exemption 7(F) applies to the arc maps at issue in this appeal. I respectfully dissent.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GLEN SCOTT MILNER,

Plaintiff - Appellant,

v.

UNITED STATES DEPARTMENT OF THE NAVY,

Defendant - Appellee.

No. 07-36056

D.C. No. CV-06-01301-JCC
Western District of Washington,
Seattle

ORDER

Before: W. FLETCHER, GOULD and TALLMAN, Circuit Judges.

Judges Gould and Tallman have voted to deny the petition for rehearing en banc; Judge W. Fletcher has voted to grant the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is denied.

OPPOSITION BRIEF

No. 09-1163

In the Supreme Court of the United States

GLENN SCOTT MILNER, PETITIONER

v.

DEPARTMENT OF THE NAVY

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether Exemption 2 of the Freedom of Information Act, 5 U.S.C. 552(b)(2), exempts from disclosure technical explosive and ammunition safety maps used by Navy personnel for the safe handling and storage of ordnance at Naval Magazine Indian Island.

TABLE OF CONTENTS

Page
Opinions below 1
Jurisdiction 1
Statement 1
Argument 12
Conclusion 26

TABLE OF AUTHORITIES

Cases:

Abraham & Rose, P.L.C. v. *United States*, 138 F.3d 1075 (6th Cir. 1998) 24, 26

Audubon Soc'y v. *United States Forest Serv.*, 104 F.3d 1201 (10th Cir. 1997) 15, 24

Caplan v. *Bureau of Alcohol, Tobacco & Firearms*, 87 F.2d 544 (2d Cir. 1978) 13, 14

Center for Nat'l Sec. Studies v. *United States Dep't of Justice*, 331 F.3d 918 (D.C. Cir. 2003), cert. denied, 540 U.S. 1104 (2004) 9

Central Bank of Denver, N.A. v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994) 18

Cox v. *Levi*, 592 F.2d 460 (8th Cir. 1979) 25

Crooker v. *Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051 (D.C. Cir. 1981) . . . . *passim*

Department of the Air Force v. *Rose*, 425 U.S. 352 (1976) 12, 13

Elliott v. *USDA*, 596 F.3d 842 (D.C. Cir. 2010), petition for cert. pending, No. 09-10585 (filed Apr. 16, 2010) 16, 23

FBI v. *Abramson*, 456 U.S. 615 (1982) 19, 21

Goldman v. *Weinberger*, 475 U.S. 503 (1986) 21

Cases—Continued: Page

Gordon v. *FBI*, 388 F. Supp. 2d 1028 (N.D. Cal. 2005) 23

Hardy v. *Bureau of Alcohol, Tobacco & Firearms*, 631 F.2d 653 (9th Cir. 1990) 10, 13, 14

Hawkes v. *IRS*, 467 F.2d 787 (6th Cir. 1972) 25

Institute for Policy Studies v. *Department of the Air Force*, 676 F. Supp. 3 (D.D.C. 1987) 23

James v. *United States Customs & Border Prot.*, 549 F. Supp. 2d 1 (D.D.C. 2008) 23

Jones v. *FBI*, 41 F.3d 238 (6th Cir. 1994) 25

Kaganove v. *EPA*, 856 F.2d 884 (7th Cir. 1988), cert. denied, 488 U.S. 1011 (1989) 14, 15, 17, 24

Kiraly v. *FBI*, 728 F.2d 273 (6th Cir. 1984) 26

Kuehnert v. *FBI*, 620 F.2d 662 (8th Cir. 1980) 25

Los Angeles Times Commc'ns, LLC v. *Department of the Army*, 442 F. Supp. 2d 880 (C.D. Cal. 2006) 23

Massachusetts v. *EPA*, 549 U.S. 497 (2007) 17

Massey v. *FBI*, 3 F.3d 620 (2d Cir. 1993) 16, 24

Mobil Oil Corp. v. *United States EPA*, 879 F.2d 698 (9th Cir. 1989) 7

NTEU v. *United States Customs Serv.*, 802 F.2d 525 (D.C. Cir. 1986) 15

National Archives & Records Admin. v. *Favish*, 541 U.S. 157 (2004) 22

Rugiero v. *United States Dep't of Justice*, 257 F.3d 534 (6th Cir. 2001), cert. denied, 534 U.S. 1134 (2002) 25

Schiller v. *NLRB*, 964 F.2d 1205 (D.C. Cir. 1992) 16

Sladek v. *Bensinger*, 605 F.2d 899 (5th Cir. 1979) 25

Cases—Continued: Page

Stokes v. *Brennan*, 476 F.2d 699 (5th Cir. 1973) 25

Stoneridge Inv. Partners, LLC v. *Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008) 18

United States Dep't of State v. *Ray*, 502 U.S. 164 (1991) 22

Vaughn v. *Rosen*, 523 F.2d 1136 (D.C. Cir. 1975) 15

Winter v. *NRDC*, 129 S. Ct. 365 (2008) 21

Statutes and regulations:

Freedom of Information Act, 5 U.S.C. 552 3

  5 U.S.C. 552(a)(2)(D) 23

  5 U.S.C. 552(a)(3)(B) 22

  5 U.S.C. 552(b) (2006 & Supp. II 2008) 4

  5 U.S.C. 552(b)(2) . . . . *passim*

  5 U.S.C. 552(b)(7) 19

  5 U.S.C. 552(b)(7)(E) 17

  5 U.S.C. 552(b)(7)(F) 5

Freedom of Information Reform Act of 1986, Pub. L. No. 99-570, Tit. I, Subtit. N, § 1802(a), 100 Stat. 3207-48 17

National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.* 7

15 U.S.C. 78j(b) 18

17 C.F.R. 240.10b-5 18

33 C.F.R. 334.1230 8

Miscellaneous: Page

Office of Info. & Privacy, U.S. Dep't of Justice, *FOIA Counselor Q&A: "Frequently Requested" Records*, FOIA Post, July 25, 2003, http://www.justice.gov/oip/foiapost/2003foiapost28.htm 23

S. Rep. No. 221, 98th Cong., 1st Sess. (1983) 17

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 26-64) is reported at 575 F.3d 959. The opinion of the district court (Pet. App. 4-25) is not published in the *Federal Supplement* but is available at 2007 WL 3228049.

JURISDICTION

The judgment of the court of appeals was entered on August 5, 2009. A petition for rehearing was denied on December 22, 2009 (Pet. App. 65). The petition for a writ of certiorari was filed on March 22, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Naval Magazine Indian Island (NMII) is located in Port Hadlock, not far from the City of Port Townsend, Washington, and has been used as a military arse-

nal since before World War II. The mission of NMII is the storage and transhipment of ammunition, weapons, weapon components, and explosives in support of the Navy, United States Joint Forces, the Department of Homeland Security, other federal agencies, and allied forces. The Navy is responsible for all operations on NMII, including law enforcement, security, force protection, and explosives safety. Pet. App. 4-5, 28.

The Navy's procedures for storage and movement of explosives and ammunition ashore is generally governed by a manual known as OP-5.[1] But site-specific and ordnance-specific information is needed to direct NMII personnel in how to apply the general practices and procedures set out in the OP-5 Manual. Accordingly, as part of the Navy's explosives safety program, the Navy has developed what is known as Explosive Safety Quantity Distance (ESQD) information, which reflects measurements of the effects of a detonation of certain quantities of certain explosives or ammunition at varying distances. ESQD information is typically expressed as mathematical formulas, and also illustrated by "arc maps," in which the center of the arc is the source of the explosion and the arc's periphery the maximum area over which the force of the explosion would project should it occur. See Pet. App. 5-6, 29.

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[1] OP-5 is "[t]he Navy's primary set of regulations for explosives safety at naval facilities" and is formally titled "Ammunition and Explosives Ashore Safety Regulations for Handling Storing and Production Renovation and Shipping, NAVSEA OP 5." C.A. E.R. 72. OP-5 states that its "[d]istribution [is] authorized to U.S. Government agencies and their contractors for administrative and operational use. Requests for this (document) must be made to the Naval Ordnance Safety and Security Activity." *Ibid.* It also states a "Warning" that "[t]his (document) contains data whose export is restricted by the Arms Export Control Act (title 22 USC SEC 2751 et seq) or Executive Order" and that "[u]nlawful export is punishable by severe criminal penalties." Finally, it provides a "Destruction Notice," which directs unauthorized recipients to "[d]estroy (this document) by any method that will prevent disclosure of the contents." *Ibid.*

In particular, ESQD information developed specifically for NMII and the types of ordnance stored at and moved through NMII is used by Navy personnel at NMII to establish minimum separation distances for various quantities of explosives. Those separation distances are used to afford reasonable safety to persons and property both for static purposes (*i.e.*, in the design, arrangement, construction, and loading of storage bunkers) and for operational purposes (*i.e.*, to identify the lowest risk locations for loading and unloading ordnance, and to identify lower-risk paths through the facility for the movement of a given load of explosives or ammunition). See Pet. App. 5-6, 29. It is the site-specific and ordnance-specific ESQD information that is at issue here.

The Navy evaluates public requests for ESQD information on a case-by-case basis and does not release the information to the general public if it determines that the release might pose a serious threat of death or injury to any person. Pet. App. 5. On occasion, the Navy has disclosed sensitive ESQD information pertaining to NMII to local first responders to support emergency preparedness. *Ibid.* Petitioner agrees, however, that none of the documents at issue in this case has been disclosed outside the Navy. Pet. C.A. Reply 19.[2]

2. Petitioner submitted a request under the Freedom of Information Act (FOIA), 5 U.S.C. 552, seeking:

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[2] In addition, there may in the past have been certain inadvertent or unauthorized disclosures of ESQD information for NMII. See C.A. Supp. E.R. 37-38; *id.* at 41-42 (paras. 4-7).

> [A]ll documents on file regarding [ESQD] arcs or explosive handling zones at the ammunition depot at Naval Magazine Indian Island. This would include all documents showing impacts or potential impacts in the explosive handling zones to the ammunition depot and the surrounding areas.
>
> [A]ll maps and diagrams of the ammunition depot at Indian Island which would show ESQD arcs or explosive handling zones; and
>
> [All] documents regarding any safety instructions or operating procedures for Navy or civilian maritime traffic within or near the explosive handling zones or ESQD arcs at the ammunition depot at Indian Island.

Pet. App. 29-30 (brackets in original); see also *id.* at 6-7.[3]

The Navy identified a total of 17 document packages (totaling approximately 1000 pages) responsive to petitioner's request. Most of these documents were ultimately released to petitioner, but 81 documents were withheld, in whole or in part, based on the Navy's conclusion that the disclosure of the ESQD information could threaten the safety and security of NMII and the surrounding community. Pet. App. 7, 30.[4]

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[3] Petitioner submitted two FOIA requests, but the court of appeals and the district court agreed that the two requests were substantially identical. See Pet. App. 6 & n.1, 29 n.1.

[4] Under FOIA, any "reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of portions which are exempt." 5 U.S.C. 552(b) (2006 & Supp. II 2008). Some of the documents provided to petitioner had ESQD information redacted. See Pet. App. 7.

3. Petitioner filed suit in the Western District of Washington under FOIA to compel the Navy to disclose the withheld ESQD information. Pet App. 7-8, 30. As relevant here, the Navy argued that the information was protected from disclosure under FOIA Exemption 2, 5 U.S.C. 552(b)(2).[5] Pet. App. 8, 30. That exemption provides that the duty to disclose "does not apply to matters that are—(2) related solely to the internal personnel rules and practices of the agency." 5 U.S.C. 552(b)(2). On cross-motions for summary judgment, the district court upheld the Navy's withholding of ESQD information. Pet. App. 4-25.

a. Central to the court's holding was the Navy's demonstration through its declarations that the ESQD information could be used by terrorists, saboteurs, or other lawbreakers to identify the location and quantity of—and thus exploit the vulnerabilities of—dangerous explosives, ordnance, or ammunition stored at NMII. Pet. App. 9, 30, 45-46. The Commanding Officer of NMII, Commander George N.T. Whitbred IV, explained in his declaration in support of the Navy's motion for summary judgment:

> [B]ecause of the varying nature of th[e] potential threat, we are particularly careful to scrutinize requests of ESQD arc information or arc maps and make determinations regarding the release of such information on a case-by-case basis. * * * However, ESQD information is not released to the general public if a determination is made that the re-

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[5] The Navy also argued that the withheld information was exempt from disclosure under Exemption 7(F), 5 U.S.C. 552(b)(7)(F), but neither the district court nor the court of appeals majority reached that issue, see Pet. App. 25, 30, 46 n.8, 47.

> lease might pose a serious threat of death or injury to any person—either inside or outside the installation boundaries.

C.A. E.R. 75.

Commander Whitbred explained that ESQD arcs were created as part of the Navy's overall safety program for the storage and handling of explosives to ensure that NMII is "operated, to the utmost extent possible, as a safe and secure facility providing ordnance logistics to a wide array of military and federal entities." C.A. E.R. 73-74, 77. Because of the numerous bunkers and other facilities scattered throughout the base (*id.* at 75-77, 86), ammunition and explosives must be stored and handled so that a fire or explosion in one area will not "set off" an explosion in another, triggering a "sympathetic detonation" or chain reaction (*id.* at 76). See Pet. App. 29. Thus, the Navy's concern is that "a terrorist or other lawbreaker would employ this same concept (in reverse) to create maximum damage with minimum outlay of effort." C.A. E.R. 76-77. Commander Whitbred explained how this reverse-engineering would work and the damage it could cause:

> [A]rmed with this information, a lay person with a rudimentary knowledge of mathematics could easily determine: the precise location of ordnance magazines[;] the types of items stored in them; which locations to target for maximum damage to personnel, critical infrastructure and disruption of loading and off-loading of ships; the mission capability of the installation; the installation's battle group capability and operational sustainability; the location of personnel and the precise numbers of personnel required to

> load and offload a ship[;] * * * [and] the quantities of materials stored.

Id. at 73.[6]

Commander Whitbred concluded:

> [B]ased on my training and experience, I believe *strongly* that release of the sensitive ESQD information involved in this case would jeopardize the safety and security of the storage, transportation and loading of ammunitions and explosives; that it would create a serious threat to the base and its surrounding communities, and it would do little or nothing to promote the purpose of democratic oversight which is at the heart of the Freedom of Information Act.

C.A. E.R. 77; see Pet. App. 46.

Petitioner submitted a declaration stating that the ESQD arcs for NMII were a matter of legitimate public concern because an explosion on Indian Island could potentially affect citizens who might happen to be in the surrounding waters.[7] He also noted instances in which ESQD information had been disclosed by the Navy—such as for the Bangor submarine base, and the disclosure of NMII ESQD information to first responders—and contended that such disclosures belied the Navy's safety concerns. C.A. E.R. 23-25.

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[6] Responding to the petitioner's assertion that ESQD information for the nearby Bangor submarine base had been released, Commander Whitbred explained that NMII is not a single-weapon facility like the submarine base, and the "difficulty of monitoring and protecting" a changing mix of explosives "is concomitantly more complex." C.A. E.R. 76. Although the record does not reflect the circumstances under which the Bangor ESQD information was released, it appears it was not pursuant to FOIA, but rather in conjunction with a citizen suit under the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.* In any event, the release of the Bangor ESQD information is immaterial as such because "release of certain documents waives FOIA exemptions *only for those documents released.*" *E.g.*, *Mobil Oil Corp.* v. *United States EPA*, 879 F.2d 698, 701 (9th Cir. 1989).

b. The district court agreed with the government that the ESQD information was appropriately withheld under the so-called "high 2" component of Exemption 2, articulated in the en banc D.C. Circuit's decision in *Crooker* v. *Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051 (1981).[8] Under the test in *Crooker*, documents are exempt from disclosure if they are "predominantly internal" and disclosure would significantly risk circumvention of an agency regulation or statute. *Id.* at 1073-1074.

The district court began its Exemption 2 analysis by determining that although the Ninth Circuit had not expressly adopted the *Crooker* test, the test developed in the Ninth Circuit's case law "bears more than a passing resemblance to the *Crooker* test." Pet. App. 20. Applying the *Crooker* test, the district court found no dispute that the ESQD information was compiled for "predominantly internal" purposes because it was used to design, array, and construct ammunition storage facilities, and to organize ammunition operations. *Id.* at 19-21; see C.A. Supp. E.R. 54 (petitioner's admission in the district court that ESQD information was compiled "for the sole purpose of obtaining internal administrative approval of construction projects").

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[7] There is an in-water restricted area at the ordnance pier on Indian Island. See 33 C.F.R. 334.1230.

[8] The distinction between what some courts have termed the "high 2" and "low 2" applications of Exemption 2 is explained in detail below. See pp. 12-15, *infra*.

As to the second prong of the *Crooker* test, the district court held that disclosure of the ESQD information "would significantly risk circumvention of law." Pet. App. 21. The court added that "when the government interest is particularly weighty—such as where concerns about national security are justified"—it is appropriate for a court to defer to the agency's expertise in assessing the risks from disclosure. *Id.* at 22 (citing *Center for Nat'l Sec. Studies* v. *United States Dep't of Justice*, 331 F.3d 918, 927 (D.C. Cir. 2003) (finding significant authority "counseling deference in national security matters")), cert. denied, 540 U.S. 1104 (2004).

The court therefore deferred to Commander Whitbred's risk assessment. Pet. App. 23. It also noted that petitioner failed to "offer any evidence truly disputing the Navy's risk assessment"; rather, he offered only his own personal opinion that the Navy's concerns about the risk from disclosure "cannot be taken seriously." *Ibid.* The district court concluded that release of the ESQD information "could cause the information to lose its utility in keeping people and property safe from harm in the event of an explosive incident"; "could provide essentially a roadmap to wreak the most havoc possible to those persons bent on causing harm"; and would "provide the proverbial fox a virtual map to the chicken coop." *Ibid.* Accordingly, because disclosure of these "predominantly internal" documents would significantly risk circumvention of law, the court held that they were exempt from disclosure. *Id.* at 21, 23, 25.

4. The court of appeals affirmed, with Judge William Fletcher dissenting. Pet. App. 26-64. The majority and dissent agreed that *Crooker* articulated the proper test

for the "high 2" component of Exemption 2: information is exempt from disclosure if "predominantly internal" and if disclosure would present a serious risk of circumvention of law. *Id.* at 34, 39-40, 47; *id.* at 55 (W. Fletcher, J., dissenting). They also agreed that *Crooker* properly described the balance intended by Congress in enacting FOIA, between the public's right to know and the countervailing need to withhold sensitive information when necessary to conduct safe, efficient, and effective government operations. *Id.* at 33-39; *id.* at 55 (W. Fletcher, J., dissenting). Moreover, the majority and dissent recognized that *Crooker* (which had relied heavily on the Ninth Circuit's decision in *Hardy* v. *Bureau of Alcohol, Tobacco & Firearms*, 631 F.2d 653, 656 (1980)) was fully consistent with the Ninth Circuit's post-*Hardy* caselaw, and further agreed that adopting the *Crooker* test would bring Ninth Circuit law into formal harmony with the post-*Crooker* decisions of the other courts of appeals. Pet. App. 33-36, 39; *id.* at 55 (W. Fletcher, J., dissenting).

The majority and dissent disagreed only on the application of this test. Compare Pet. App. 40-47 with *id.* at 55-60 (W. Fletcher, J., dissenting). The majority explained that the ESQD information was used by Navy personnel in conjunction with the Navy's OP-5 Manual to govern operations at NMII, and therefore ESQD information was "one part of the internal policies and procedures that NMII personnel are bound to follow when handling and storing explosive ordnance." *Id.* at 40. ESQD information was "an integral part of the Navy's personnel practices"; was "used for * * * instructing agency personnel on how to do their jobs"; was "certainly not written to regulate the public"; and "ha[s] absolutely no legal or enforcement ramifications whatsoever on the citizens of the Puget Sound region." *Id.* at 40, 41, 42. The court held that the information was therefore "predominantly internal," *id.* at 42, and did not lose that character simply because of "limited disclosure for official purposes," *id.* at 41.

As to the circumvention-of-law prong, the court of appeals held that the Navy's declarations (see pp. 5-7, *supra*) were to be accorded "substantial weight," Pet. App. 46, and that they established a significant risk that the ESQD information, if released to the public, could be used by saboteurs or terrorists to pin-point an attack on the munitions depot so as to wreak the most havoc possible, *id.* at 45. "[D]isclosure of the ESQD data would quickly render those documents obsolete for the purpose for which they were designed." *Ibid.* (internal quotation marks and citation omitted). The ESQD information is "created as a planning tool to prevent catastrophic detonations; disclosing [it] would make catastrophe more likely." *Ibid.* The majority noted that "[t]he dissent does not apparently dispute that this risk exists; it concludes only that risking sabotage of military explosives is not the sort of 'circumvention of law' that should concern us." *Ibid.* Taking the contrary view, the majority concluded that disclosure of this "predominantly internal" information "would present a serious risk of circumvention of law," *id.* at 47, and Exemption 2 therefore protected it from disclosure.

Judge Fletcher dissented only as to "the majority's application of the part of *Crooker* that deals with * * * the circumvention requirement." Pet. App. 55 (internal quotation marks and citation omitted). In Judge Fletcher's view, *Crooker*'s "circumvention" requirement was limited to individuals or entities directly regulated by the agency in question. *Id.* at 58 ("In all of the reported cases dealing with the issue, Exemption 2 applies only to documents whose release would facilitate circumvention of agency regulation *by a regulated person or entity.*"). Here, he said, "[t]he Navy is not acting as a regulatory or law enforcement agency," and the ESQD information "do[es] not regulate anyone or anything outside the Navy itself." *Ibid.*

Judge Fletcher also concluded that Exemption 7(F) did not apply. Pet. App. 60-62. But acknowledging that disclosure could be "as dangerous as Commander Whitbred claims," Judge Fletcher expressed a willingness "to remand to the district court * * * to give the Navy an opportunity to classify" the documents and "thereby to qualify them under Exemption 1." *Id.* at 63.[9]

ARGUMENT

The decision of the court of appeals aligns the Ninth Circuit with the standard invoked by every court of appeals to consider an Exemption 2 case in recent decades. The court of appeals correctly applied that standard, and its decision does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. The court of appeals correctly described and appropriately adhered to the consensus understanding of the so-called "high 2" application of Exemption 2.

a. This Court addressed the scope of Exemption 2 in *Department of the Air Force* v. *Rose*, 425 U.S. 352 (1976). There, law review editors sought case summaries of honor and ethics hearings at the Air Force Academy. The government argued that Exemption 2 protected the information from disclosure because the disciplinary case summaries were of only internal significance and "the public could not reasonably be expected to have an interest" in them. *Id.* at 369-370. Finding that "the nature of [the Air Force Academy's] instruction—and its adequacy or inadequacy—is significantly related to the substantive public role" of the institution, the Court held that the documents were not protected from disclosure by Exemption 2. *Id.* at 368-369.

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[9] The majority, by contrast, found that classification of ESQD information would be impractical, because some individuals (such as first responders) might need the information in the future but lack the necessary security clearances to see it. See Pet. App. 41.

Rose confirmed that one function of Exemption 2 "is simply to relieve agencies of the burden of assembling and maintaining for public inspection matter in which the public could not reasonably be expected to have an interest." 425 U.S. at 369-370. This purpose has been labeled the "low 2" component of Exemption 2. But *Rose* recognized that Exemption 2 might also apply—as several courts of appeals had held—to "situation[s] * * * where disclosure may risk circumvention of agency regulation." *Id.* at 369. That aspect of Exemption 2 was not, however, applicable on the facts of *Rose*. See *id.* at 364 ("We need not consider * * * the applicability of Exemption 2" in cases "where knowledge of administrative procedures might help outsiders to circumvent agency regulations or standards.") (citation omitted).

After *Rose*, the courts of appeals recognized that *Rose* left open the development of a "high 2" aspect of Exemption 2. See, *e.g.*, *Caplan* v. *Bureau of Alcohol, Tobacco & Firearms*, 587 F.2d 544, 547 (2d Cir. 1978) (noting that *Rose* "was careful to qualify" its holding so as to leave open the possibility of a "high 2" form of Exemption 2 covering situations presenting risks of circumvention); *Hardy* v. *Bureau of Alcohol, Tobacco &*

Firearms, 631 F.2d 653, 656 (9th Cir. 1980) (similar, adopting *Caplan* analysis); *Crooker* v. *Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051, 1066 (D.C. Cir. 1981) (en banc) (similar); *Kaganove* v. *EPA*, 856 F.2d 884, 888 (7th Cir. 1988), cert. denied, 488 U.S. 1011 (1989) (similar); Pet. App. 32 n.2 (noting that *Rose* "explicitly left open" the "high 2" issue).

b. The benchmark case developing the "high 2" component is the D.C. Circuit's en banc decision in *Crooker*. Relying on FOIA's text and history—and persuaded by the fact that "every other circuit considering the issue [had on some basis] barred the mandatory release" of materials carrying a risk of law circumvention—the *Crooker* court concluded that "the words 'personnel rules and practices' encompass not merely minor employment matters," as *Rose* recognized, but also "other rules and practices governing agency personnel, including significant matters like job training for law enforcement personnel." *Crooker*, 670 F.2d at 1056, 1074.

Crooker drew on similar holdings from the Second and Ninth Circuits concluding that Exemption 2 protected "law enforcement materials" where disclosure would risk circumvention of regulation. See 670 F.2d at 1056 (citing *Hardy*, 631 F.2d at 656; *Caplan*, 587 F.2d at 547). *Crooker* echoed *Caplan* and *Hardy* in describing the particular materials at issue in all three cases—ATF training manuals—as law-enforcement-related. But the D.C. Circuit recognized that Exemption 2's statutory text ("related solely to * * * internal personnel rules and practices") did not limit the exemption to law enforcement material. *Crooker* also noted the interpretational tension in Exemption 2 between the "potentially all-encompassing" term "related" on the one hand, and the "potentially all-excluding" term "solely" on the other. *Ibid.* (quoting *Vaughn* v. *Rosen*, 523 F.2d 1136, 1150-1051 (D.C. Cir. 1975) (Leventhal, J., concurring)). *Crooker* gave meaning to both by adopting a standard of "predominant internality." *Id.* at 1074. Thus, a document falls within Exemption 2 if (1) it is "predominant[ly] internal[]," and (2) its "disclosure [would] significantly risk[] circumvention of agency regulations or statutes." *Ibid.*

c. *Crooker*'s two-pronged test is a bedrock of Exemption 2 jurisprudence. See, *e.g.*, Pet. App. 39 ("*Crooker* has become the authoritative case on Exemption 2."); *id.* at 55 (W. Fletcher, J., dissenting) ("I agree that we should adopt the reasoning of the D.C. Circuit articulated in *Crooker.*"); *Audubon Soc'y* v. *United States Forest Serv.*, 104 F.3d 1201, 1203-1204 (10th Cir. 1997) (citing *Crooker* as the proper formulation of the "'high 2' approach[] adopted in four circuits"); *Kaganove*, 856 F.2d at 888-889 (relying exclusively on *Crooker* as the definitive resolution of the "high 2" issue "left open in *Rose*").

Petitioner claims (Pet. 2) that there is discord in the courts of appeals regarding the application of Exemption 2 in this regard. That is not so. No appellate decision has challenged the fundamental soundness of the *Crooker* test. See, *e.g.*, *NTEU* v. *United States Customs Serv.*, 802 F.2d 525, 530-531 (D.C. Cir. 1986) (Exemption 2 applies "[w]here disclosure of a particular set of documents would render those documents operationally useless, * * * whether or not the agency identifies a specific statute or regulation threatened by disclosure"; schemes used by the Customs Service to evaluate the qualifications of job applicants are covered by Exemption 2 because disclosure would give an unfair advantage to applicants in possession of the schemes); *Kaganove*, 856 F.2d at 889 (agency's employee promotion rating plan was covered by Exemption 2 because disclosure would frustrate the document's objective); *Schiller* v. *NLRB*, 964 F.2d 1205, 1207-1208 (D.C. Cir. 1992) (same regarding agency's litigation strategy for Equal Access to Justice cases); *Massey* v. *FBI*, 3 F.3d 620, 622 (2d Cir. 1993) (Exemption 2 covers symbols identifying confidential informants because "internal agency information may be withheld if * * * the government demonstrates that disclosure of the material would risk circumvention of lawful agency regulations.") (internal quotation marks and citation omitted); *Elliott* v. *USDA*, 596 F.3d 842, 850 (D.C. Cir. 2010) (Exemption 2 covers blueprints for buildings on a government research campus because disclosure and potential public dissemination would present a risk to national security and bioterrorism laws), petition for cert. pending, No. 09-10585 (filed Apr. 16, 2010).

d. Petitioner contends that *Crooker* misinterprets Exemption 2. None of the reasons petitioner gives for rejecting the nearly 30-year-old decision in *Crooker*, and the many decisions following it, has merit.

i. Petitioner first suggests that *Crooker*'s interpretation of Exemption 2 is a "significant departure from the plain language of the Exemption," which he apparently contends is limited to the terms and conditions of employment. Pet. 2; see Pet. 11. Petitioner is mistaken. The *Crooker* opinion carefully demonstrates that its test is fully consistent with the language of Exemption 2. 670 F.2d at 1055-1056. In particular, *Crooker* recognizes that as a textual matter, "the words 'personnel rules and practices' encompass not merely minor employment matters, but may cover other rules and practices governing agency personnel, including significant matters." *Id.* at 1056. The limitations in Exemption 2 come instead from other words and phrases in the statute, such as "internal" and "[r]elated solely to." *Ibid.* If anything, it is petitioner's proposal that contradicts the plain language of Exemption 2 by atextually limiting it to "trivial materials," Pet. 9.

Moreover, Congress has approved the *Crooker* analysis by codifying parts of its test verbatim into a related exemption, Exemption 7(E), 5 U.S.C. 552(b)(7)(E). See Freedom of Information Reform Act of 1986, Pub. L. No. 99-570, Tit. I, Subtit. N, § 1802(a), 100 Stat. 3207-48. The Act's legislative history expressly states that the amendment was modeled after "the 'circumvention of the law' standard that the D.C. Circuit established in its en banc decision in *Crooker* v. *BATF*, 670 F.2d 1051 (D.C. Cir. 1981) (en banc) (interpreting Exemption 2)." S. Rep. No. 221, 98th Cong., 1st Sess. 25 (1983). As the Seventh Circuit concluded, "*Crooker* accurately expresses congressional intentions" regarding Exemption 2 "[b]ecause Congress saw fit to codify the very language of *Crooker*, and because nothing in the legislative history of the Reform Act suggests the slightest disagreement with that case's holding." *Kaganove*, 856 F.2d at 889; see Pet. App. 37 (also recognizing the Congressional imprimatur on *Crooker*).

To be sure, ordinarily "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *Massachusetts* v. *EPA*, 549 U.S. 497, 530 n.27 (2007) (citation omitted). But where, as here, Congress amends one part of a balanced and integrated set of statutory provisions (Exemption 7(E)) in light of its understanding of how another pre-existing part (Exemption 2) functions, Congress is properly understood to endorse both the newly enacted provision and the complementary understanding of the pre-existing provision. Cf. *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 162-163 (2008) (adhering to *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994)—which rejected a private right of action for aider and abettor liability under 15 U.S.C. 78j(b) and Securities and Exchange Commission Rule 10b-5, 17 C.F.R. 240.10b-5—in light of "Congress' amendment to the [Securities Exchange] Act [in the wake of *Central Bank*] restoring aiding and abetting liability in certain cases but not others").

ii. Petitioner also contends (Pet. 10-11) that the *Crooker* test will "swallow FOIA itself" because "[t]here is little data that does not have some potential impact on an agency's operation, and thus could be used to help a potential wrongdoer interfere." That misunderstands the *Crooker* test and ignores its circumscribed application over the past three decades. A document is exempt from disclosure only "if disclosure *significantly* risks circumvention of agency regulations or statutes." *Crooker*, 670 F.2d at 1074 (emphasis added). Indeed, the D.C. Circuit took account of petitioner's very concern and explained: "We add the word 'significantly' to stress the narrow scope of our construction of Exemption 2; in all cases in which the Government relies on Exemption 2, it remains the Government's burden to prove the 'significant risk.'" *Ibid.*

Here, the Navy offered detailed declarations supporting its position, see pp. 5-7, *supra*, and both courts found that the Navy compellingly established the risk posed by release of the ESQD information, see Pet. App. 23, 45-46. Petitioner relied solely on his personal opinion, and he offered no expert of his own to contradict Commander Whitbred's risk analysis. Petitioner's quarrel (Pet. 15-17 & n.3) with the lower courts' conclusion that the record established the requisite level of risk is misplaced, and that fact-bound objection would not in any event merit this Court's attention.

Moreover, the history of this case further undercuts petitioner's predictions about the scope of withholding. Notwithstanding Exemption 2, the Navy disclosed a large amount of material in response to petitioner's request. See p. 4, *supra*. Some of that material likely would have satisfied the other requirements of the *Crooker* test, but because it did not pose a significant risk of circumvention, and did not fall within any other exemption, it was released. For the same reason, petitioner's hypotheticals—about the "hours of the Navy museum gift shop" or the cost and purveyors of "baked beans" (Pet. 11) or "report[s] disclosing corruption" (Pet. 16-17)—are exaggerated. Such information ordinarily would not be expected to pose a "significant risk of circumvention," though (as always) the inquiry would be a factual one on which the government would bear the burden of proof, see Pet. App. 31, 45-46.

iii. Petitioner further objects (Pet. 19-20) that *Crooker* lacks a "balancing" of the sort required under some other FOIA exemptions. But nothing in Exemption 2's text or history calls for balancing. Nor is it true that FOIA exemptions invariably require a balancing test. See, *e.g.*, *FBI* v. *Abramson*, 456 U.S. 615, 631 (1982) (explaining that Exemption 7, 5 U.S.C. 552(b)(7), is "a scheme of categorical exclusion; [Congress] did not invite a judicial weighing of the benefits and evils of disclosure on a case-by-case basis"). Instead, Exemption 2 requires the government to demonstrate a significant risk of circumvention from disclosure in a case such as this. That requirement inherently accommodates the presumptive public interest in disclosure and the overriding concern that disclosure not pose a substantial risk to the government's functioning. See *Crooker*, 670 F.2d at 1074 ("Congress has done the necessary balancing and enacted FOIA to represent the 'cross-currents' of concern.").

2. The court of appeals correctly applied *Crooker* to the explosives maps and other ESQD information at issue in this case. That application was specific to the facts of this case and does not merit review.

a. The ESQD information at issue was "predominantly internal," as the court of appeals majority and dissent agreed. See Pet. App. 42 n.4. It is information specific to NMII that is used in conjunction with the Navy's general rules and practices (the OP-5 Manual) to direct personnel in the placement and movement of ordnance to reduce the risk of a catastrophic explosion. ESQD information is directed to and used by Navy personnel in the discharge of their duties; it does not regulate the public or constitute secret law applied to the public. See *id.* at 40-42.

Petitioner contends (see, *e.g.*, Pet. 29) that "internal personnel rules and practices" is a concept limited to "law enforcement" materials. There is no basis in the statute's text for such a limitation. See Pet. App. 35-36. And petitioner's contention is entirely inconsistent with *Crooker* and its progeny that have applied Exemption 2 to such materials as job application and promotion procedures, litigation strategy documents, and research facility blueprints. See pp. 15-16, *supra*.

Nor would limiting Exemption 2 to "law enforcement" materials comport with FOIA's larger structure. The statute's exemptions express a "concern[] with the disclosure of sensitive materials," Pet. App. 36, but separately provide an exemption (Exemption 7) that expressly addresses law enforcement materials, see *id.* at 36-37. Limiting Exemption 2 to "law enforcement" would "incongruent[ly]" protect sensitive information only when contained in law enforcement records, but not when that same information was found in documents developed predominantly for internal agency use. *Id.* at 36 (citing *Crooker*, 670 F.2d at 1065 ("It would be inconsistent to no small degree to hold that Exemption 2 would not bar the disclosure of investigatory techniques when contained in a manual restricted to internal use, but that Exemption 7(E) would exempt the release of such techniques if contained in an 'investigatory record.'")); see ***Abramson***, 456 U.S. at 628 ("There is nothing to suggest, and no reason for believing, that Congress would have preferred a different outcome simply because the information is now reproduced in a non-law enforcement record.").

b. i. The Navy also established that disclosure of the ESQD information would in fact significantly risk circumvention of law. Commander Whitbred's declaration and other materials vividly illustrate how ESQD information, if disclosed, could be used by terrorists, saboteurs, or other lawbreakers to exploit the risks that attend the storage and handling of ordnance, and intentionally cause the very sort of catastrophe that ESQD information is developed to avoid. See pp. 5-7, *supra*; Pet. App. 45-46.

The district court and court of appeals both correctly determined that the Navy's declarations carried "substantial weight." Pet. App. 46; see *Winter* v. *NRDC*, 129 S. Ct. 365, 377 (2008) ("We 'give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest.'") (quoting *Goldman* v. *Weinberger*, 475 U.S. 503, 507 (1986)). And because petitioner "d[id] not offer any evidence truly disputing the Navy's risk assessment," the courts below quite properly rejected his bare personal opinion that the Navy's risk assessment "cannot be taken seriously." Pet. App. 23. Even if it were not overwhelmingly supported by the record, that case-specific risk assessment would not merit reexamination in this Court.[10]

ii. Petitioner (Pet. 16-17) and the dissent below (Pet. App. 58) contend that the "circumvention" requirement must be limited to individuals or entities actually regulated by the agency in question. Like petitioner's other arguments for limiting Exemption 2, there is no textual basis for that contention.

Petitioner's contention fails to account for the elemental principle of FOIA law that disclosure to one is disclosure to all. See *National Archives & Records Admin.* v. *Favish*, 541 U.S. 157, 172 (2004) ("[D]isclosure does not depend on the identity of the requester. As a general rule, if the information is subject to disclosure, it belongs to all."); *id.* at 174 ("[O]nce there is disclosure, the information belongs to the general public."). Moreover, FOIA requires responsive material to be provided "in any form or format requested * * * if the record is readily reproducible by the agency in that form or format." 5 U.S.C. 552(a)(3)(B). The ESQD information exists in electronic format, and there would be no way to control its dissemination or even know who obtained it after it was released. Indeed, if the Navy received several similar requests, 5 U.S.C. 552(a)(2)(D) might require it to post its explosives maps on its "electronic reading room" website for all comers. See Office of Info. & Privacy, U.S. Dep't of Justice, *FOIA Counselor Q&A "Fequently Requested" Records*, FOIA Post, July 25, 2003, http://www.justice.gov/oip/foiapost/2003foiapost28.htm (discussing conditions triggering 5 U.S.C. 552(a)(2)(D) obligation).

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[10] Petitioner's insinuation (Pet. 20) that Commander Whitbred invoked Exemption 2 here because petitioner is "an anti-war activist" is without foundation. See *United States Dep't of State* v. *Ray*, 502 U.S. 164, 179 (1991) ("We generally accord Government records and official conduct a presumption of legitimacy.").

The principle underlying the non-circumvention basis for applying Exemption 2 is that a FOIA disclosure should not "benefit those attempting to violate the law and avoid detection." *Crooker*, 670 F.2d at 1053. That risk of circumvention is present whether it is posed by the FOIA requester himself, or instead arises from the uncontrollable dissemination of the information. See, *e.g.*, *Elliott*, 596 F.3d at 850 (sustaining withholding under Exemption 2 of blueprints for buildings on a government research campus because their disclosure and dissemination would present a serious risk to national security and bioterrorism laws).[11]

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[11] Numerous other cases apply Exemption 2 based on the risk of circumvention by persons obviously not subject to regulation by the agency in question. See, *e.g.*, *James* v. *United States Customs & Border Prot.*, 549 F. Supp. 2d 1, 8-9 (D.D.C. 2008) (hackers misusing computer codes to access sensitive government computer systems); *Los Angeles Times Commc'ns, LLC* v. *Department of the Army*, 442 F. Supp. 2d 880, 889, 902 (C.D. Cal. 2006) (al Qaeda members targeting private contractors identified in a database of serious incident reports in Iraq); *Gordon* v. *FBI*, 388 F. Supp. 2d 1028, 1036 (N.D. Cal. 2005) (air terrorists using sensitive information about the preparation of "no fly" lists); *Institute for Policy Studies* v. *Department of the Air Force*, 676 F. Supp. 3, 5 (D.D.C. 1987) (enemy military personnel exploiting a low frequency groundwave emergency network program designed to survive a nuclear attack).

Nor, where the orderly internal functioning of an agency's personnel is at stake, is there a meaningful difference between a malefactor who would upset the agency by frustrating its activity in the regulatory domain and one who would instead upset the agency by frustrating its activities in the physical domain (the risk that Commander Whitbred explained in this case).

In any event, this issue concerns the precise scope of one prong of the test for one aspect of a single FOIA exemption. Such a fine point of law does not, absent other considerations not present here, command this Court's attention.

3. Contrary to petitioner's assertion (Pet. 1-2, 22-30), there is no conflict among the circuits on the "high 2" component of Exemption 2. As the Ninth Circuit observed, by formally adopting the *Crooker* standard, it brought itself into complete alignment with not only the D.C. Circuit, but also several other Circuits. See Pet. App. 39 (citing *Massey*, 3 F.3d at 622 (2d Cir.); *Abraham & Rose, P.L.C.* v. *United States*, 138 F.3d 1075, 1080 (6th Cir. 1998); *Kaganove*, 856 F.2d at 889 (7th Cir.); *Audubon Soc'y*, 104 F.3d at 1203-1204 (10th Cir.)).[12] Indeed, we are aware of no appellate decision that rejects *Crooker*.

The circuit split petitioner claims is illusory—or at least is very stale. Two cases petitioner cites as not embracing a "high 2" component of Exemption 2 concerned nontrivial information whose disclosure would not have risked circumvention of law, and so could not in any event have been withheld under Exemption 2. See *Sladek* v. *Bensinger*, 605 F.2d 899, 902 (5th Cir. 1979) ("[W]e have concluded that disclosure of the sections of the [Drug Enforement Administration] manual requested by Sladek would not impede law enforcement efforts."); *Stokes* v. *Brennan*, 476 F.2d 699, 702 (5th Cir. 1973) ("[T]here is no support in fact for the government's contention that disclosure of this entire [Occupational Safety and Health Administration] manual and associated documents would allow an employer to anticipate the matters which compliance officers would or would not cover in their investigations."). Another case petitioner cites fully sustained the government's withholding of material, in part under Exemption 2, and in part on other theories. See *Cox* v. *Levi*, 592 F.2d 460, 463 (8th Cir. 1979). And two other cases petitioner cites were remanded for further factual development, leaving it unclear whether those courts of appeals' views of Exemption 2 were outcome-determinative. See *Hawkes* v. *IRS*, 467 F.2d 787, 796-797 (6th Cir. 1972); *Kuehnert* v. *FBI*, 620 F.2d 662, 667 (8th Cir. 1980).

---

[12] *Abraham & Rose* and *Audubon Society* each rejected the government's Exemption 2 claim because the court determined the information at issue was not "sufficiently related to a personnel rule or practice." *Abraham & Rose*, 138 F.3d at 1081; see *Audubon Soc'y*, 104 F.3d at 1204 ("[T]he maps are not sufficiently 'related to internal personnel rules and practices.'"). But neither court rejected the *Crooker* framework; to the contrary, both cases cited *Crooker* approvingly. See *Abraham & Rose*, 138 F.3d at 1080; *Audubon Soc'y*, 104 F.3d at 1203-1204.

At all events, every one of those cases predates *Crooker*, and some even predate *Rose*. No post-*Crooker* decision from those courts has rejected *Crooker*. Indeed, the Fifth and Eighth Circuits have apparently had no occasion to decide any Exemption 2 case since *Crooker*. The Sixth Circuit has decided four Exemption 2 cases since *Crooker*, and three affirmed the government's invocation of the Exemption. See *Rugiero* v. *United States Dep't of Justice*, 257 F.3d 534, 552 (6th Cir. 2001), cert. denied, 534 U.S. 1134 (2002); *Jones* v.

FBI, 41 F.3d 238, 244-245 (6th Cir. 1994); *Kiraly* v. *FBI*, 728 F.2d 273, 276 n.6 (6th Cir. 1984). The fourth decision would have rejected any Exemption 2 claim on the facts. See *Abraham & Rose*, 138 F.3d at 1080-1082 (discussed at note 12, *supra*). There is every reason to believe that those courts, if confronted with a meritorious case, would adopt *Crooker*'s analysis and join every other court of appeals to consider the question in recent decades. Unless and until they do otherwise, this Court's intervention is unnecessary.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General

TONY WEST
Assistant Attorney General

LEONARD SCHAITMAN
HOWARD S. SCHER
Attorneys

MAY 2010

JOINT
APPENDIX

No. 09-1163

Supreme Court, U.S.
FILED
AUG 3 1 2010
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In The
Supreme Court of the United States

GLEN SCOTT MILNER,
Petitioner,

v.

UNITED STATES DEPARTMENT OF THE NAVY,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

JOINT APPENDIX

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88

JOINT APPENDIX
TABLE OF CONTENTS

Page

Relevant docket entries, Milner v. United States Department of the Navy, U.S. District Court, Western District of Washington, No. 2:06-cv-01301-JCC .... App. 1

Relevant docket entries, Milner v. United States Department of the Navy, U.S. Court of Appeals, Ninth Circuit, No. 07-36056 .... App. 2

Supplemental Declaration of Katherine George .... App. 4

Excerpts from Exhibit A to Supplemental Declaration of Katherine George, EPA Indian Island Site Description .... App. 6

Supplemental Declaration of Glen Scott Milner .... App. 8

Exhibit A to Supplemental Declaration of Glen Milner, Excerpts from NAVSEA OP 5 Volume 1, Seventh Revision .... App. 14

Exhibit D to Supplemental Declaration of Glen Milner, Naval Magazine Indian Island Base Guide .... App. 42

Declaration of Glen Scott Milner .... App. 49

Letter from Phil Johnson .... App. 51

NAVMAG Indian Island ESQD Arcs map .... App. 52

Declaration of Commander George NT Whitbred IV, USN .... App. 53

Declaration of Richard T. Adams .... App. 64

NAVMAG Indian Island Base Map .... App. 71

NAVMAG Indian Island & Vicinity Map .... App. 72

Supplemental declaration of Commander George NT Whitbred IV .... App. 73

Declaration of Donald E. Klein .... App. 79

Declaration of Stephen M. Smith .... App. 82

The following items were produced in the Petition for Writ of Certiorari and are not reproduced herein:

Order in U.S. District Court, Western Washington District No. CV-06-01301-JCC (Oct. 30, 2007)

Opinion in Ninth Circuit Court of Appeals No. 07-36056 (Aug. 5, 2009)

Order in Ninth Circuit Court of Appeals No. 07-36056, denying en banc rehearing (Dec. 22, 2009)

Relevant Docket Entries

Milner v. United States Department of the Navy,
U.S. District Court, Western District of Washington,
No. 2:06-cv-01301-JCC

09/11/06	Complaint for Declaratory and Injunctive Relief for Violation of the Freedom of Information Act
11/03/06	Answer to Complaint
03/16/07	Notice of Filing Administrative Record in Paper or Physical Form
03/16/07	Motion for Summary Judgment
03/19/07	Administrative Record filed
07/06/07	Amended Motion for Summary Judgment
08/03/07	Response to Amended Motion for Summary Judgment
08/03/07	Declaration of Glen Scott Milner
08/03/07	Declaration of Phil Johnson
08/03/07	Declaration of Katherine George
08/17/07	Reply to Response to Amended Motion for Summary Judgment
08/31/07	Reply to Response to Amended Motion for Summary Judgment
08/31/07	Supplemental Declaration of Glen Scott Milner
08/31/07	Supplemental Declaration of Katherine George
10/30/07	Order by Judge John C Coughenour
10/30/07	Judgment in a Civil Case/Decision by Court
12/14/07	Notice of Appeal

Relevant Docket Entries
Milner v. United States Department of the Navy,
U.S. Court of Appeals, Ninth Circuit, No. 07-36056

12/18/07	Docketed Cause and Entered Appearances of Counsel
7/31/08	Filed original and 15 copies of Appellant Glen Scott Milner Opening Brief
09/16/08	Filed Answering Brief by United States Department of the Navy
09/17/08	Filed Appellee United States Department of the Navy supplemental excerpts of record on appeal
09/30/08	Filed Reply Brief by Glen Scott Milner
03/04/09	Filed Appellant Glen Scott Milner citation of supplemental authorities
03/12/09	Argued and submitted to William A. Fletcher, Ronald M. Gould and Richard C. Tallman
08/05/09	Filed Opinion (William A. Fletcher, Ronald M. Gould and Richard C. Tallman) affirmed. Judge: WAF Dissenting, Judge: RCT Authoring. Filed and entered judgment
09/10/09	Filed Appellant Glen Scott Milner petition for rehearing en banc
09/21/09	Submitted Amicus brief for review and filed Motion to become amicus curiae by Allied Daily Newspapers of Washington et al.
09/24/09	Filed order (William A. Fletcher, Ronald M. Gould and Richard C. Tallman). The motion for leave to file

	brief of amici curiae by Allied Daily Newspapers of Washington, et al., is granted
09/24/09	Filed order (William A. Fletcher, Ronald M. Gould and Richard C. Tallman) Defendant-Appellee is directed to filed a consolidated response to Plaintiff-Appellant's petition for rehearing en banc filed with this court on September 10, 2009, and to the amicus brief by Allied Daily Newspapers of Washington, et al., filed with this court on September 24, 2009
11/10/09	Filed Appellee United States Department of the Navy response to Petition for Rehearing En Banc
12/22/09	Filed order (William A. Fletcher, Ronald M. Gould and Richard C. Tallman) Judges Gould and Tallman have voted to deny the petition for rehearing en banc Judge W. Fletcher has voted to grant the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. The petition for rehearing en banc is denied
12/30/09	Mandate issued

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

GLEN SCOTT MILNER, Plaintiff, v. UNITED STATES DEPARTMENT OF THE NAVY, Defendant.	NO. CV-06-01301-JCC SUPPLEMENTAL DECLARATION OF KATHERINE GEORGE

I, KATHERINE GEORGE, declare as follows:

1. I am an attorney for the plaintiff, Glen Milner. I am competent to testify in this matter. The information in this declaration is based on my personal knowledge.

2. On behalf of Mr. Milner, I had discussions with Peter Winn, attorney for the Navy, in an attempt to reach agreement about the adequacy of the Navy's affidavits and Vaughn Index in this case. I told Mr. Winn that the affidavits and index together did not, in our view, meet the Lion Raisins requirement for a particularized explanation of why each document withheld from disclosure is allegedly exempt from the Freedom of Information Act.

3. According to a document on the Web site of the U.S. Environmental Protection Agency, the Navy's Indian Island ammunition depot is within a

few hundred feet of Fort Flagler State Park. A true and correct copy of that document is attached hereto as Exhibit A.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated this [30th] day of August, 2007, at Seattle, Washington.

[SIGNATURE OMITTED]
KATHERINE GEORGE

EPA region 10
PORT HADLOCK Jefferson County
DETACHMENT (USNAVY) Indian Island
WASHINGTON
EPA ID# WA4170090001I

Last Update: August, 2007
Site Description

The Port Hadlock Detachment (US NAVY) site is on Indian Island, a 2,700 acre island southeast of Port Townsend, Washington. The Navy purchased the island in 1939, and uses it for munitions storage and handling. Potential sources of hazardous substances include municipal and industrial landfills, drum and container storage areas, above and below ground storage tanks, burn pits, and disposal pits. Disposal activities at several site locations resulted in soil, groundwater, sediment, and shellfish contamination. The contaminants are ordnance compounds, heavy metals, polychlorinated biphenyls (PCBs), and pesticides.

No private residences are on the island; however, there are a limited number of military residences. A public highway connects the Olympic Peninsula with Indian Island and Marrowstone Island, which has a community of about 250 residences. Groundwater on the island is not currently used for drinking or other domestic purposes. Commercial and recreational harvesting of shellfish and other aquatic organisms occurs on island beaches and in coastal waters surrounding the island. Although most of the island is restricted, civilian boaters occasionally enter along beaches to collect clams. Native Americans have treaty rights to collect shellfish in this area. Fort Flagler State Park is a few hundred feet from the north end of the island. A variety of marine species use off-shore waters around the island for spawning, nursing, and feeding. The island supports diverse wildlife populations, including the bald eagle.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

GLEN SCOTT MILNER, Plaintiff, v. UNITED STATES DEPARTMENT OF THE NAVY, Defendant.	NO. CV-06-01301-JCC SUPPLEMENTAL DECLARATION OF GLEN SCOTT MILNER

I, GLEN SCOTT MILNER, declare as follows:

1. I am the plaintiff and am competent to testify in this matter. The information in this declaration is based on my personal knowledge.

2. The purpose of this declaration is to update my prior declaration dated August 2, 2007, to address new allegations and present new information.

3. Commander George Whitbred, in his supplemental declaration dated August 10, 2007, stated that NAVSEA OP 5 is a "restricted" document. On August 21, 2007, I conducted a simple Google search using the search terms "esqd arcs indian island." As a result, I obtained a document containing 52 unredacted pages of NAVSEA OP 5. These 52 pages appear to include all 41 pages of Chapter 8, *Facilities,* as well as part of Chapter 13,

Treatment and Destruction of Ammunition and Explosives. The pages were contained in a document titled EOD SAFETY IMPROVEMENTS, available at www.joyceandassoc.com. A true and correct copy of the document is attached as Exhibit A. The availability of this document illustrates that NAVSEA OP 5 is not restricted as Commander Whitbred contends.

4. I had previously disclosed that I was able to purchase 64 other pages of NAVSEA OP 5 by responding to an Internet ad. Commander Whitbred stated in his August 10, 2007 declaration that this purchase had been "referred to the proper authorities to determine whether any enforcement action should be taken with respect to the disclosure of this document." A true and correct copy of the 64 pages, obtained from the National Lightning Safety Institute, is attached as Exhibit B. These pages, as well as those in Exhibit A, illustrate that the content of NAVSEA OP 5 is benign and does not jeopardize operations at Naval Magazine Indian Island, as claimed by the Navy.

5. Commander Whitbred also stated in his August 10, 2007 declaration that it is "irresponsible" for me to state that the Navy handles explosives in a manner that places much of Port Townsend Bay at risk of harm from an explosion. On July 25, 2007, the U.S. Army Corps of Engineers published in the Federal Register a proposal for a Naval Restricted Area at Port Townsend. The Proposed Rule is to "safeguard military vessels and United States government facilities from sabotage and other subversive acts, accidents, or incidents of similar nature." The Proposed Rule also states, "The

regulations are also necessary to protect the public from potentially hazardous conditions that may exist as a result of military use of the area." A true and correct copy of the Proposed Rule is attached as Exhibit C. If Port Townsend Bay was not at risk, the Corps would not propose to restrict its waters "to protect the public from potentially hazardous conditions that may exist as a result of military use of the area."

6. Commander Whitbred also stated in his August 10, 2007 declaration that the information I had obtained through the Freedom of Information Act, stating that ammunition is routed by railcars to the submarine base at Bangor and then by truck to Indian Island, should not have been released. Commander Whitbred stated, "[I]f the decision were mine to make today, given the current state of tensions in the world, I would strike the balance differently and withhold parts of the document." A 2006-07 "West Sound Navy" guidebook, authorized and distributed by the Navy, states that after the Gulf War, Indian Island "was selected as one of two West Coast ports to be upgraded for the efficient trans-shipment of containerized ammunition in the event of mobilization. Several infrastructure improvements were made including the construction of a rail to truck transfer facility at Submarine Base Bangor and installation of the Department of Defense's largest crane at the Indian Island ammunition pier in 2000." Thus, the Navy is freely distributing information that Commander Whitbred states should be withheld. A true and correct copy of the cover of the guidebook and the relevant section on Indian Island is attached as Exhibit D.

7. In an August 13, 2007 declaration, Donald Klein stated that he produced a 19-page Navy Region Northwest document, "GIS-Portal Integration," showing "real-life data" concerning ESQD arcs at Indian Island. Mr. Klein incorrectly stated that the document, which I viewed on the Internet earlier this year, was "taken offline in November 2006." Mr. Klein also incorrectly stated that "when the system was active, it was not open to the public. In order to have access the user was required to request an account, be authenticated, and required a login and password to access the system." Actually, I was able to access the 19-page document in question simply by typing "indian island esqd arcs" in Google and clicking on https://tsc.wes.army.mil/symposium/2006/Wednesday%5C105%20wed%20am%5Cjsem.pdf. I never requested an account, never was authenticated, and never had a login or password. The Web page is still open to the public, despite the Navy's claim that it contains sensitive information. This document and others show that the Navy continues to release the same type of information that it is withholding from me.

8. In an August 10, 2007 declaration, Stephen M. Smith said that Phil Johnson, an elected member of the Jefferson County Board of Commissioners, gave me a copy of the ESQD arc map that was attached to Mr. Johnson's April 23, 2007 declaration in this case. This is not true. I have never communicated with Mr. Johnson. I have never met him. Mr. Johnson did not give me an ESQD arc map.

9. Commander Whitbred stated in his August 10, 2007 declaration that "all ammunition and explosives are designed with failsafe arming and insensitive explosives which can be subjected to the extreme environments of combat operations." Actually a 2003 document concerning construction of an Ordnance Transfer Facility at Indian Island says that "unserviceable or poorly documented" ammunition is also handled there. The document states, "This ordnance consists of large quantities of randomly delivered, unknown condition, potentially retrograde ordnance delivered from various locations or by unscheduled ship visits to NAVMAG Indian Island." A true and correct copy of the relevant page of the construction document is attached as Exhibit E.

10. Commander Whitbred also stated in his August 10, 2007 declaration that the reason why some information regarding explosive safety is freely available, while some such information is not, is "intentional decision-making, not happenstance." If this is true, the Navy intended for me to know that a specific location at the Indian Island ammunition pier may have explosives equal to 3 million pounds of TNT. Also, the Navy intended for a Port Townsend newspaper audience to know that the Indian Island ESQD arc map that was published earlier this year is up to date. The Navy has never stated that the release of this type of information was a mistake. The explosive information released to me, and the Navy's statement to the newspaper that the ESQD arc map is still accurate, are exactly like the information I am requesting in this case.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated this [30th] day of August, 2007, at Seattle, Washington.

[SIGNATURE OMITTED]
GLEN SCOTT MILNER

Publisher's Note:

This document contains technical data whose export is restricted by the Arms Export Control Act (Title 22, USC, Sec 2751 et. seq.) or Executive Order 12470. ProQuest has omitted this content.

TABLE OF CONTENTS

Quick Reference Phone Numbers 1

Welcome 3

Check In Procedures 5

Naval Base Kitsap 6

Rules and Regulations 8

Sheltering 10

Tenant Commands 11

Quality of Life Programs and Services 31

Kitsap Communities 45

Tenant Commands Telephone Directory 59

Foldout Maps .... Foldout

Military Buyer's Guide .... Yellow Pages

[GRAPHIC AND PUBLISHER'S ADDRESS OMITTED]

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Naval Base Kitsap • Naval Hospital
Bremerton • Naval Magazine Indian Island •
Base Guide

[SEAL OMITTED]

Naval Magazine Indian Island

Naval Magazine (NAVMAG) Indian Island's strategic mission is to provide ordnance logistics support to the Pacific Fleet and the joint services in peace and war. In 1941, the Navy commissioned the Naval Magazine and Net Depot on Indian Island, and used the organization for the storage of Navy munitions and assembly of mines and submarine nets. The island was placed in a reduced activity status in 1959, and then reactivated in 1979 when munitions storage and handling facilities at Bangor were moved to Indian Island.

NAVMAG comprises the entirety of the 2,716-acre Indian Island located on the northeast corner of Washington State's Olympic Peninsula. Residents live on nearby Marrowstone Island, to the east, and in Port Townsend, which is north-northwest of the site. Port Townsend is the largest population center near the island. NAVMAG Indian Island is approximately 7 square miles. The island contains a wealth of cultural and natural resources. There are several Native American sites on the island, as well as historically significant pioneer homestead sites and WW II era buildings.

After the Persian Gulf War, NAVMAG was selected as one of two West Coast ports to be upgraded for the efficient trans-shipment of containerized ammunition in the event of mobilization. Several infrastructure improvements were made including construction of a rail to truck transfer facility at Submarine Base Bangor and installation of the Department of Defense's largest crane at the Indian Island ammunition pier in 2000.

In 1999, the 40-ton container crane was delivered and certified for the ammunition pier.

The crane, or "Big Blue" as it is commonly referred to, is a noticeable structure for miles around the Indian Island/Port Hadlock area. Reaching into the sky from the Islands ammunition pier, it serves as a proud reminder of the superior ordnance handling capabilities of Naval Magazine Indian Island. It is capable of lifting 89,600 lbs. container weight.

By 2000, NAVMAG had become the Pacific's joint ordnance mobilization command, supporting numerous joint exercises designed to test and validate the mobilization of ordnance to the Pacific Theater of operations. At the same time, a significant part of NAVMAG's – and the Navy's – mission and vision has been to incorporate and develop best practices of environmental stewardship and sustainability.

Amenities:

Navy Exchange: There is a small exchange located in building 69. The hours are Monday – Friday 10 a.m. to 3 p.m.

Boating

Location: Boat launches are located just North of the small boat pier. The small boat pier is off limits for recreational purposes. Anderson Pond can accommodate canoes or a small rowing boat.

Facility: There are two small wooden piers at Anderson pond and easy access at various points around the pond for launching a canoe or rowboat.

Fishing (salt-water)

Location: All waters surrounding Indian Island

Fishing (fresh-water)

Location: Anderson Lake

Shell Fishing

Location: Only beach number 8 is authorized for recreational claming and oystering.

Facility: Beach 8 has adequate unpaved access roads.

Note for fishing: *Appropriate Washington State fishing license is required, and all State regulations for season catch limits and authorized equipment must be followed. In addition, any holes dug in the beach must be refilled after finishing claming.*

Fitness Center

Location: Ground floor of Bldg. 151, the Gymnasium.

Facility: Modern fitness center with aerobic and anaerobic exercise machines, male and female head and shower facilities and coed sauna

Smoking: *Prohibited in vehicles everywhere on station. Otherwise authorized within the Industrial area (roadside signs indicate when so authorized) and within the Magazine areas only in specifically approved smoke shelters at the Ammunition Pier and near production facilities.* ***Smoking is never authorized during recreational activity within the Magazine Area***

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

GLEN SCOTT MILNER, Plaintiff, v. UNITED STATES DEPARTMENT OF THE NAVY, Defendant.	NO. CV6-1301 DECLARATION OF GLEN SCOTT MILNER

I, GLEN SCOTT MILNER, declare as follows:

1. I am the plaintiff and am competent to testify in this matter. The information in this declaration is based on my personal knowledge.

2. I am 56 years old and have lived in the Puget Sound region my entire life. I live in Lake Forest Park, Washington.

3. Since 1984, I have been involved with the Ground Zero Center for Nonviolent Action, a peace organization in Poulsbo, Washington. This non-profit organization was formed in 1977 and owns 3.8 acres adjoining the Trident submarine base at Bangor, Washington. The organization works primarily to raise community awareness of the lethal potential of the Trident submarine system.

4. For the past twenty years as a Ground Zero member, I have been involved in research and

writing concerning the Trident submarine system and explosive hazards related to Navy activities in the Puget Sound region. I have published articles in the Bulletin of Atomic Scientists, BASIC (British American Security Information Council, in London), Seattle Times, Seattle Post-Intelligencer, Kitsap Sun, Port Townsend Leader, Washington Free Press, and Real Change in Seattle. Also, numerous radio and television shows and newspaper articles have featured my comments about local Navy activities, or included information that I obtained through the Freedom of Information Act (FOIA).

[SEAL OMITTED]
Board of Commissioners
Jefferson County, Washington

April 16, 2007

I, Phil Johnson, do hereby declare the following:

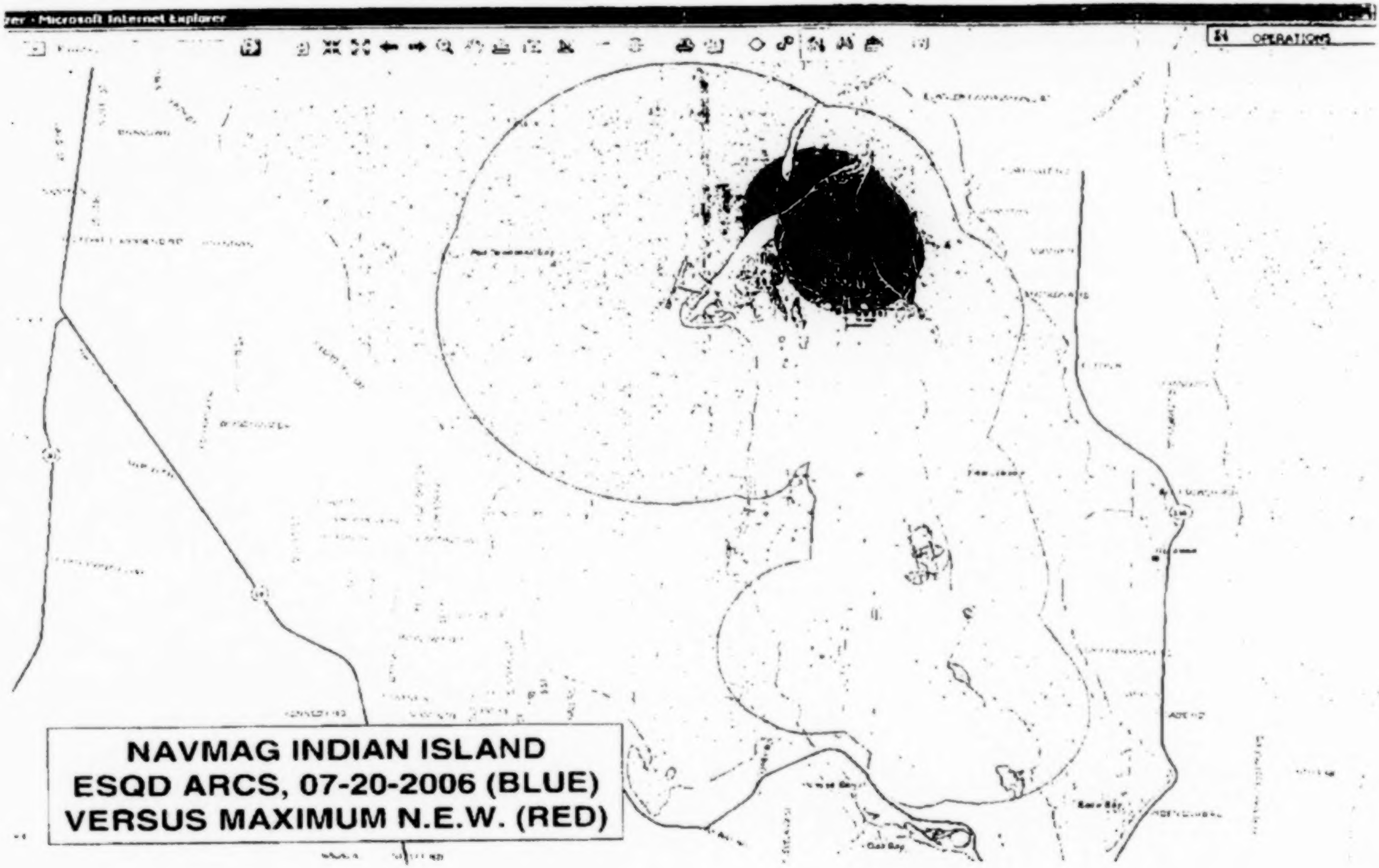
1) On February 21, 2006, I requested a public forum regarding public safety concerns at Naval Magazine Indian Island.

2) On March 14, 2006, Admiral French declined by omission a public forum in favor of continued engagement with civic organizations.

3) On April 3, 2006, I again requested of Admiral French a public forum on safety concerns on Naval Magazine Indian Island.

4) On May 3, 2006, Admiral French again declined.

5) Shortly thereafter I requested and was provided the enclosed ESQD ARCS Map.
[SIGNATURE OMITTED]
Phil Johnson,
Jefferson County Commissioner
District #1



NAVMAG INDIAN ISLAND
ESQD ARCS, 07-20-2006 (BLUE)
VERSUS MAXIMUM N.E.W. (RED)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

GLENN SCOTT MILNER,)
)
Plaintiff,)
)
v.) Civil Action No.
) CV61301
)
DEPARTMENT OF NAVY,)
)
Defendant.)
)

DECLARATION OF COMMANDER GEORGE N. T. WHITBRED IV, USN

I, GEORGE N. T. WHITBRED IV, pursuant to the provisions of 28 U.S.C. 1746, declare as follows:

1. I am the Commanding Officer of Naval Magazine, Indian Island. I have held this position since August 25, 2006. Naval Magazine, Indian Island is located in Port Hadlock, WA. As Commanding Officer, Naval Magazine, Indian Island, I report to Commander, Navy Region Northwest for shore installation management and Commander, Navy Munitions Command CONUS West Division for ammunition operations and explosives safety. Additionally, I am responsible for the safety and security of Naval Magazine Indian Island personnel and property. I have been trained as an Explosive Ordnance Disposal (EOD) Technician and currently hold the qualification as a

Master EOD Technician, the highest qualification within the Department of Defense EOD program. My 20 year career has included positions of great responsibility within the Navy's explosives management and safety programs including: Ordnance Officer, Naval Weapons Stations Yorktown, VA; Commanding Officer, Explosive Ordnance Disposal Mobile Unit SEVENTEEN, Oak Harbor, WA; and EOD Officer in Charge on board USS Theodore Roosevelt (CVN-71).

2. The statements made in this declaration are based upon my personal knowledge or upon information available to me in my official capacity and are true and correct to the best of my knowledge and belief.

3. The mission of Naval Magazine, Indian Island is the storage and transshipment or "throughput" of military ammunition in support of the Navy, U.S. Joint forces and Allied forces. The Navy is responsible for all operations and the mission requirements on the installation, including law enforcement, security, force protection and explosives safety. Naval Magazine, Indian Island in entirely concurrent jurisdiction.

4. The purpose of this declaration is to describe the potential harm that would result if certain explosives safety information, especially information regarding explosive safety quantity distance arcs (ESQD arcs), were released under the Freedom of Information Act (FOIA).

5. The Department of Defense has a comprehensive explosives safety program under the auspices and authority of the Defense Department Explosive Safety Board (DDESB). The DDESB was

established by Congress in 1928 to provide oversight of the development, manufacture, testing, maintenance, demilitarization, handling, transportation and storage of explosives, including chemical agents, on Department of Defense facilities worldwide. The DDESB's regulations give special attention to preventing conditions that might endanger life or property inside or outside the boundaries of Department of Defense activities. DDESB establishes Department of Defense-wide safety standards designed to prevent or correct hazardous conditions associated with ammunitions and explosives; it informs Department of Defense entities of safety issues related to ammunitions and explosives; and it promotes "best practices" – that is, technical advances and research and testing to maintain safety excellence. DDESB also reviews and approves all general site plans for construction or modification of ammunition and explosives facilities.

6. Department of Navy explosive safety regulations supplement those of the DDESB. The Navy's primary set of regulations for explosives safety at naval facilities is entitled: Ammunition and Explosives Ashore Safety Regulations for Handling Storing and Production Renovation and Shipping, NAVSEA OP 5. This manual, and all other Navy's explosives safety manuals, contain the following warnings regarding distribution:

DISTRIBTUION STATEMENT

Distribution authorized to U.S. Government agencies and their contractors for administrative and operational use. Requests for this (document) must be made to the Naval Ordnance Safety and Security Activity.

WARNING

This (document) contains data whose export is restricted by the Arms Export Control Act (title 22 USC SEC 2751 et seq) or Executive Order. Unlawful export is punishable by severe criminal penalties.

DESTRUCTION NOTICE

Destroy (this document) by any method that will prevent disclosure of the contents.

7. On December 7, 2003, plaintiff submitted a FOIA request to the Commanding Officer, Naval Magazine Indian Island. Plaintiff requested the following:

> All documents on file regarding Explosive Safety Quantity Distance (ESQD) arcs or explosive handling zones at the ammunition depot at Naval Magazine Indian Island. This would include all documents showing impacts or potential impacts of activities in the explosive handling zones to the ammunition depot and the surrounding areas.
> (Declaration of Anthony J. Robinson, Tab 1)

Plaintiff also requested all maps and diagrams of the ammunition depot at Naval Magazine Indian Island which showed the ESQD arcs or explosive handling zones, and documents regarding any safety instructions or operating procedures for Navy or civilian maritime traffic within or near the explosive handling zones or ESQD arcs at Naval Magazine Indian Island.

8. My predecessor as Commanding Officer of Naval Magazine, Indian Island, Captain David Belt, recommended against disclosure of the documents, determining that release of such information could have serious force protection and homeland security repercussions. Captain Belt concluded that if released, the requested information could be used to threaten the safety of personnel, the security of the base, and the health and safety of the public in the surrounding area. He stated that, after careful review, it is apparent that the information contained in the requested documents has potential for misuse and harm. He stated further that, armed with this information, a lay person with a rudimentary knowledge of mathematics could easily determine:

- the precise location of ordnance magazines
- the types of items stored in them;
- which locations to target for maximum damage to personnel, critical infrastructure and disruption of loading and off-loading of ships;
- the mission capability of the installation;
- the installation's battle group capability and operational sustainability;
- the location of personnel and the precise numbers of personnel required to load and offload a ship.

Upon close review of the record, I strongly concur with Captain Belt's analysis, and would make the additional observation that release of the requested information could also disclose the quantities of materials stored.

9. Explosive Quantity-Distance requirements and explosives standards are designed to provide the inhabitants of nearby communities, the personnel of Department of Defense shore activities and adjacent public and private property owners reasonable safety from serious injury or destruction from fires or explosions and to minimize the loss of valuable ammunition stores through fires or explosions. In the wrong hands, however, this information could be used to threaten the security of the installation, and to harm persons and property on the installation, as well as in nearby communities. The ultimate purpose of the explosives safety program is to *protect* people and property from the harm that could occur from an incident, accident or breach of security; the release of this information to the general public would have exactly the opposite effect. Thus, part of my job is to safeguard sensitive information that could be used to create such a security breach.

10. One aspect of the Defense Department's explosive safety program is the use of Explosive Safety Quantity Distance (ESQD) arcs. ESQD arcs are based on measured explosion effects at varying distances and define minimum separation distances for quantities of explosives based on required degrees of protection. These separation distances are established to afford reasonable safety to Department of Navy shore activities, and, to the extent possible, protect adjacent public and private

property. ESQD arcs are based on the degree of protection needed, the type and amount of material involved, segregation of materials, explosive effects and permissible exposures. We use these arcs to design, array, and construct ammunition storage facilities, and to organize ammunition operations for risk mitigation and enhanced safety. Typically ESQD determinations are expressed as mathematic formulas and "arc maps." There are multiple types of arcs which are designed to be protective in different ways.

11. While all ESQD arcs can be "reversed engineered" with the right information, thereby creating targets of opportunity, some arcs reveal more than others about the particular ammunition, explosive or weapons system.

12. It is because of the varying nature of this potential threat, we are particularly careful to scrutinize requests of ESQD arc information or arc maps and make determinations regarding the release of such information on a case-by-case basis. We sometimes share ESQD information with local municipalities, if the request supports a legitimate government purpose such as emergency response preparedness. For example, we have shared ESQD information with "first responders" at both Jefferson County and the City of Port Townsend. However, ESQD information is not released to the general public if a determination is made that the release might pose a serious threat of death or injury to any person - either inside or outside the installation boundaries.

13. Every request for such information must be scrutinized carefully in order to balance the public's

interest in the freedom of information about their government, with the legitimate needs of law enforcement, of homeland security, and of the health and safety of the community. This balancing must take place against the context of the safety and security requirements inherent with ammunition and explosives. While I am not a "denial authority" under FOIA, as the Commanding Officer of Naval Magazine, Indian Island, I am personally responsible for assessing the risk that release of such information would pose.

14. Plaintiff asserts that "it is inconsistent of the defendant to deny the materials requested, which do not involve nuclear materials, when it has released ESQD arcs for Trident submarine bases at Kings Bay, Georgia, and Bangor, Washington." Complaint at page 11, lines 6 - 10. I am not an expert on Trident Submarines; nor do I know the reasons why information about ESQD arcs might have been released by those commands in the past. However, I can say that Naval Magazine Indian Island not a submarine base. The nature of its mission is completely different, as are its security parameters, and physical characteristics.

15. Furthermore, Naval Magazine Indian Island is not a single-weapon system facility, such as the bases referenced where the risks are associated with a single program. Naval Magazine Indian Island is a depot for multiple weapons, weapons components, ammunition and explosives. Naval Magazine Indian Island has two primary functions: temporary storage (staging and throughput or "transhipment") and longer-term storage. The items arrive and depart daily by truck and ship. We may both see newly

manufactured items as well as explosives and ammunition that, while unused, have been already been entered into the system. We store / move explosives and ammunition for all the military services, allied forces, Homeland Security and other federal agencies. We have even stored commercial explosives, such as blasting agent, when it is determined that movement through a military base is safer than through a commercial port. Thus, the mix of explosives and ammunition types and the amounts held at Naval Magazine Indian Island is in a constant state of flux. The difficulty of monitoring and protecting such explosives from misuse is concomitantly more complex.

16. Because we store and transport so many types and quantities of explosives and ammunition, a large part of our explosive safety program is focused on "compatibility" standards. DOD explosive safety standards classify ordnance by net explosive weight, hazard class and compatibility groups, etc. in order to maximize safety and minimize unintended consequences. Should an accident occur - whether man made or caused by natural events - our explosive safety program is designed to minimize and isolate any adverse effects. For example, we store and handle ammunition is such a way that a fire or explosion of in one area will not "set off" an explosion of another area. This sort of chain reaction is known as "sympathetic detonation" and is a concept that DOD has studied for years. Of course, a terrorist or other lawbreaker would employ this same concept (in reverse) to create maximum damage with minimum outlay of effort. It is one of

the reasons we are so careful about releasing data, while we are focused on safety others are not.

17. When an operational commander requires ammunitions or explosives for a forward deployed unit, a request is created that activates a worldwide ordnance logistics network. Naval Magazine Indian Island is small part of that network. While I normally have about 30 to 45 days notice of an on-load or off-load operation, I have no control over the pace or extent of the movement. This constant flow of material onto the installation, from place to place within the installation and, finally, off the installation makes security a challenge. The DOD explosive safety program helps me manage that risk and, while the establishment of ESDQ arcs are a small part of the overall explosive safety program, they are an essential tool in minimizing risk of harm to persons and property - both on and off base.

18. In summary, Naval Magazine Indian Island is to be operated, to the utmost extent possible, as a safe and secure facility providing ordnance logistics to a wide array of military and federal entities. I support the right to freedom of information about the military as an essential component of the oversight and control of our government by its citizens. However, based on my training and experience, I believe *strongly* that release of the sensitive ESQD information involved in this case would jeopardize the safety and security of the storage, transportation and loading of ammunitions and explosives; that it would create a serious threat to the base and its surrounding communities, and it would do little or nothing to promote the purpose of

democratic oversight which is at the heart of the Freedom of Information Act.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

[SIGNATURE OMITTED]
GEORGE N. T. WHITBRED IV

Executed this 12th day of February 2007.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

GLENN SCOTT MILNER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No.
	)	CV61301
	)	
DEPARTMENT OF NAVY,	)	
	)	
Defendant.	)	
	)	

DECLARATION OF RICHARD T. ADAMS

I, RICHARD T. ADAMS, pursuant to the provisions of 28 U.S.C. 1746, declare as follows:

1. I am the Explosives Safety Technical Expert at the Naval Ordnance Safety and Security Activity (NOSSA). I have held this position since 1988. NOSSA is the Chief of Naval Operations technical agent for explosive safety.

2. The statements made in this declaration are based upon my personal knowledge or upon information available to me in my official capacity and are true and correct to the best of my knowledge and belief.

3. The purpose of this declaration is to describe how the Department of the Navy manages requests for copies of the publication entitled: *Naval Sea Systems Command OP 5, Volume 1, Seventh*

Revision Ammunition and Explosives Safety Ashore, Safety Regulations for Handling, Storing, Production Renovation and Shipping, Change 1, May 2002 (OP 5) and to describe the potential harm that would result if this manual were released under the Freedom of Information Act (FOIA). OP 5 has been in existence since the 1940s and is updated by the Navy on an annual basis. The Seventh Revision, Change 1, is the version that was effective in December 2003, when Mr. Milner filed the subject FOIA request. The current version is Seventh Revision, Change 6.

4. OP 5 provides explosives safety regulations for maintaining a safe environment for the storage, handling, and production of ammunition and explosives at Navy and Marine Corps installations worldwide. These regulations are derived from Department of Defense regulations, and it is the responsibility of each activity's Commanding Officer to ensure that all explosives operations in their activity are performed within these regulations.

5. To ensure compliance throughout the Navy, there are established inspections and oversight procedures in place. The personnel involved in these processes are well trained, in order to understand and properly apply the regulations in OP 5. All construction associated with explosives-related facilities must be approved through an elaborate review process, culminating with approval by the Department of Defense Explosives Board. This process has been completed for all facilities and operations at Naval Magazine, Indian Island, verifying that they all meet Department of Defense

criteria, respective of risk to personnel both within and outside the activity boundaries.

6. Because OP 5 defines the effects of both accidental and intentional detonations, terrorists targeting a military installation, such as the Naval Magazine, Indian Island would be able to identify those targets that would create the most collateral damage, or be the most crippling to mission capabilities. This information is provided through formulas, that consider the type and quantity of explosives material and defines the vulnerability of various structures to blast and fragment damage. The most sensitive of this data being the distances that must be maintained between explosives concentrations, ships, or vehicles to prevent mass detonations, which would result in a coalescence of blast overpressure and becomes a multiplier of potential damage.

7. OP 5 has the following warnings printed prominently on the front cover, title page, etc.

DISTRIBUTION STATEMENT

Distribution authorized to U.S. Government agencies only; administrative / operational use; May 2002. Other requests for this document must be referred to the Naval Sea Systems Command, (SEA-09T).

WARNING

This document contains technical data whose export is restricted by the Arms Export Control Act (Title 22, USC, Sec 2751 et. seq.) or Executive

Order 12470.[1] Violations of these laws are subject to severe criminal penalties.

DESTRUCTION NOTICE

Destroy by any method that will prevent disclosure of the contents or reconstruction of the document.

8. NOSSA works for the Naval Sea Systems Command. One of NOSSA's functions is to control the distribution of OP 5, including managing requests for copies. NOSSA is very cautious about releasing OP 5. We do not release this document to the general public, as it is exempt from release under FOIA. If a contractor needs OP 5 to perform required work for the government, NOSSA requires the sponsoring government agency to make the request and to control the document. If a foreign government requires OP 5, for example under the foreign military sales program, it is given a sanitized version that only contains that portion of the document that is required.

9. In addition, OP 5 contains technical data that is subject to the Arms Export Control Act, 22 U.S.C. §2751 et seq. and is protected from release by 10 USC §130. Pursuant to 10 U.S.C. §130, the Department of Defense is authorized to withhold

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[1] In light of the reauthorization of the Export Administration Act of 1979, Executive Order 12470 was revoked by Executive Order 12525. All rules, regulations, orders, licenses or other forms of administrative action taken pursuant to 50 USC §1702 and Executive Order 12470 relating to the administration of Section 38(e) of the Arms Export Control Act remains in effect until amended or revoked under proper authority.

from the public any technical data with military application in the possession of, or under the control of, the Department of Defense if such data may not be exported lawfully outside the United States without an approval, authorization, or license under the Export Administration Act of 1979 (50 App. U.S.C. §§2401–2420) or the Arms Export Control Act (22 U.S.C. §2751). Technical data is defined as "any blueprints, drawings, plans, instructions, computer software and documentation, or other technical information that can be used, or adapted for use, to design, engineer, produce, manufacture, operate, repair, overhaul, or reproduce and military or space equipment or technology concerning such equipment." See, 10 U.S.C. §130(c).

10. For the OP5, the operative regulations are found at 22 C.F.R. Part 120 which contain the International Traffic in Arms Regulations and 22 C.F.R. Part 121 which contains the United States Munitions List which is maintained by the U.S. Department of State. 22 C.F.R. Part 121 lists twenty-one (21) categories of munitions and technical data which require a U.S. Department of State license for export under the Arms Export Control Act. OP 5 contains protected technical data from the following restricted categories:

Category I - Firearms, Close Assault Weapons and Combat Shotguns;
Category II - Guns and Armament;
Category III - Ammunition/Ordnance;
Category IV - Launch Vehicles, Guided Missiles, Ballistic Missiles, Rockets Torpedoes, Bombs and Mines;

Category V - Explosives and Energetic Materials, Propellants, Incendiary Agents and Their Constituents;
Category VI - Vessels of War and Special Naval Equipment;
Category VIII - Aircraft and Associated Equipment; and
Category X - Protective Personnel Equipment and Shelters.

Protected technical data is littered throughout OP 5. While I have not compared all 816 pages of OP 5 to the International Traffic in Arms Regulations and the United States Munitions List, from my general knowledge of OP 5 and based on a quick survey of the document, I conclude that approximately every second or third page contains protected technical data.

11. The forward to the OP 5 states that there are two additional volumes. What is described as "OP 5 Volume II" is now Naval Sea Systems Command Instruction (NAVSEA SW020-AC-SAF-010). This instruction is even more sensitive than Volume I, as is contains sensitive specific data regarding weapons and weapon systems. Volume III - *Advance Bases* contains explosive safety information for combat areas, field conditions, and advance (foreign) bases. It too is sensitive and its release is tightly controlled. Volume III would not apply to Naval Magazine, Indian Island.

12. On December 7, 2003, plaintiff requested:

> All documents on file regarding Explosive Safety Quantity Distance (ESQD) arcs or

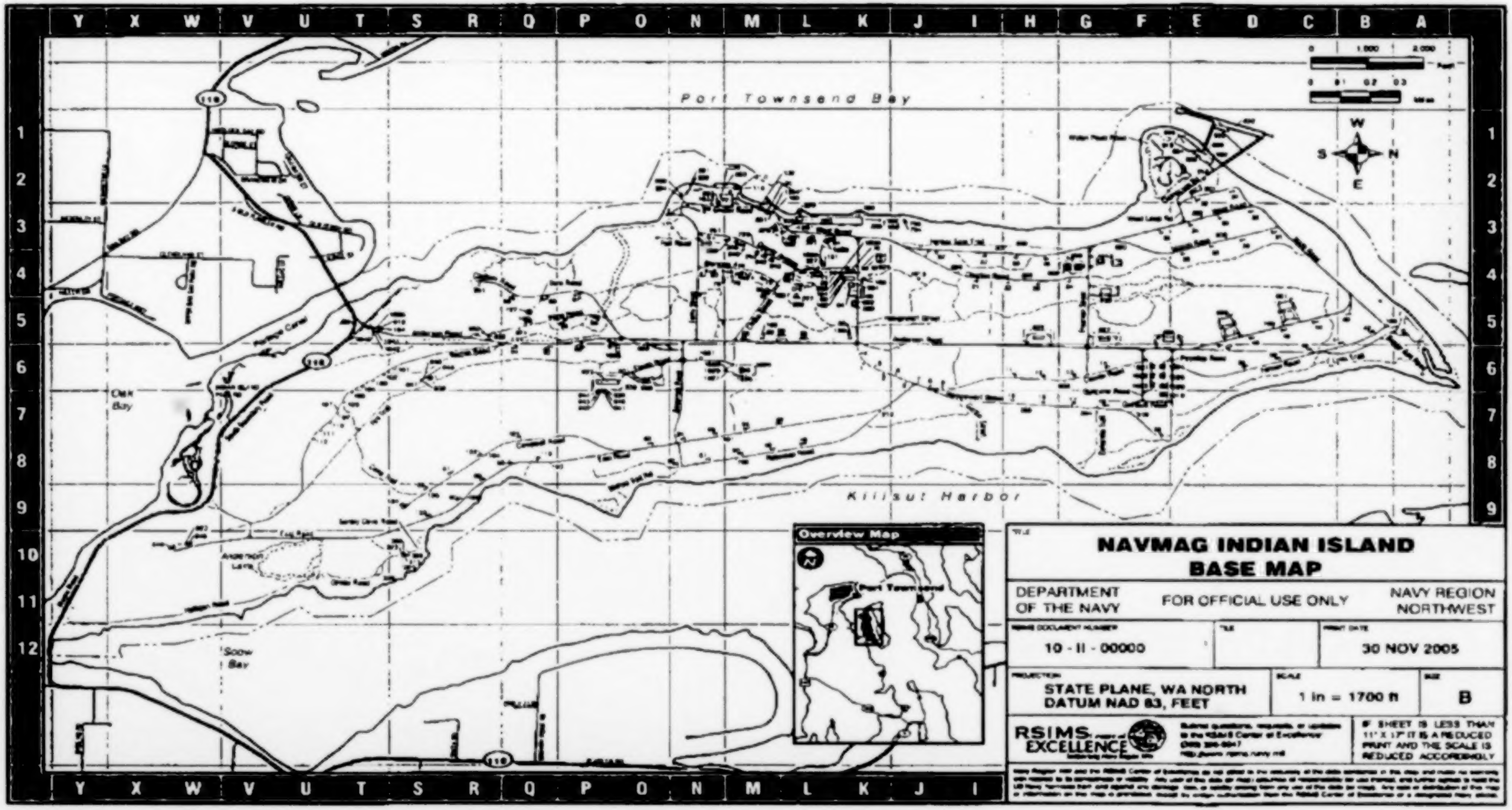
> explosive handling zones at the ammunition depot at Naval Magazine Indian Island. This would include all documents showing impacts or potential impacts of activities in the explosive handling zones to the ammunition depot and the surrounding areas.

Plaintiff also requested all maps and diagrams of the ammunition depot at Naval Magazine Indian Island which showed the ESQD arcs or explosive handling zones, and documents regarding any safety instructions or operating procedures for Navy or civilian maritime traffic within or near the explosive handling zones or ESQD arcs at Naval Magazine Indian Island. I have reviewed both Volumes II and III of OP 5 and have determined that they are neither responsive to Mr. Milner's FOIA request nor relevant to this case.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

[SIGNATURE OMITTED]
RICHARD T. ADAMS

Executed this 20th day of June 2007.



NAVMAG INDIAN ISLAND BASE MAP

DEPARTMENT OF THE NAVY

FOR OFFICIAL USE ONLY

NAVY REGION NORTHWEST

10 - II - 00000

30 NOV 2005

STATE PLANE, WA NORTH
DATUM NAD 83, FEET

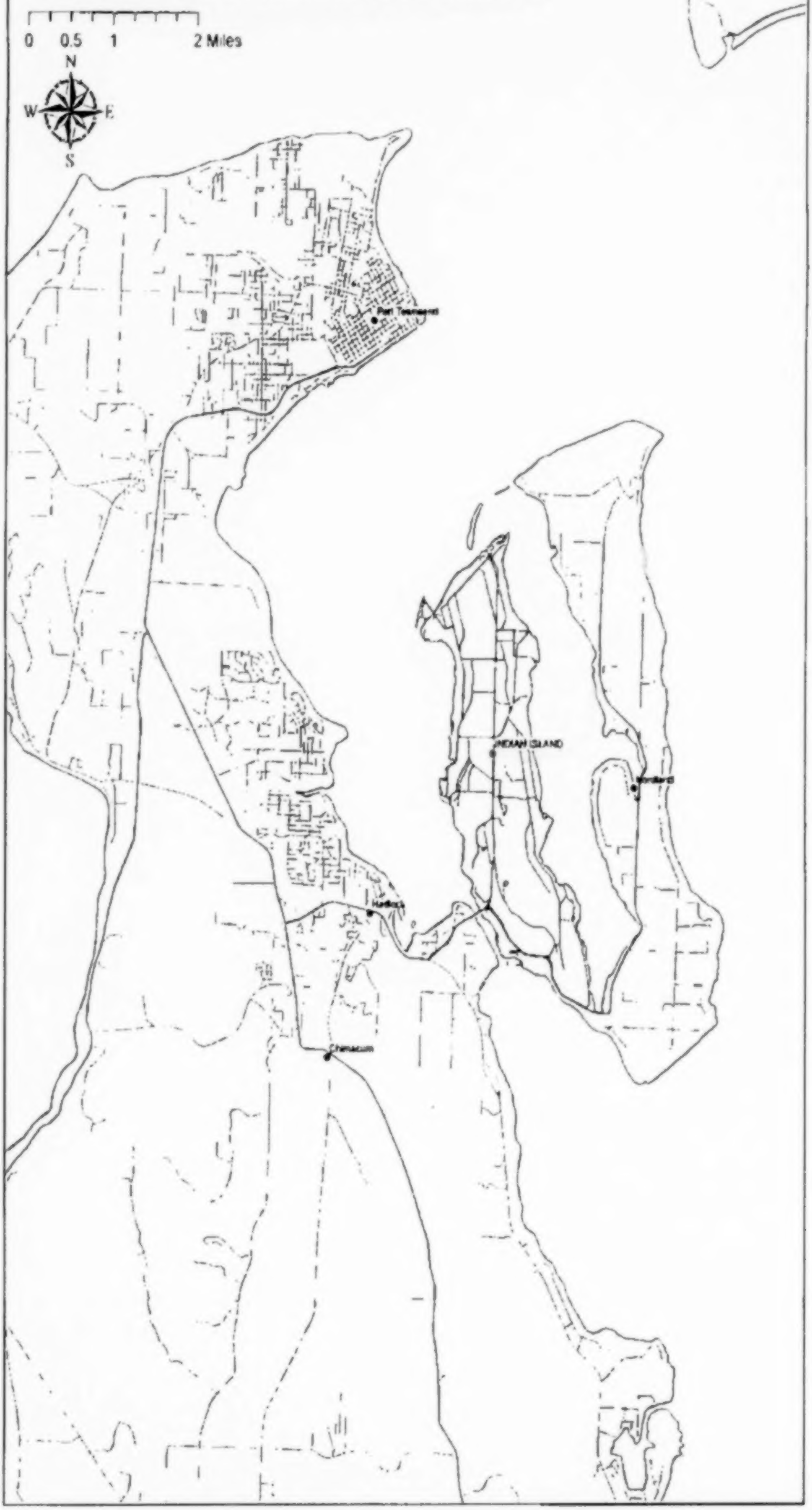
1 in = 1700 ft

B

RSIMS EXCELLENCE

IF SHEET IS LESS THAN 11" X 17" IT IS A REDUCED PRINT AND THE SCALE IS REDUCED ACCORDINGLY

NAVMAG INDIAN ISLAND AND VICINITY



UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

GLENN SCOTT MILNER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No.
	)	CV6 1301
	)	
DEPARTMENT OF NAVY,	)	
	)	
Defendant.	)	
	)	

SUPPLEMENTAL DECLARATION OF COMMANDER GEORGE N. T. WHITBRED IV, USN

I, GEORGE N. T. WHITBRED IV, pursuant to the provisions of 28 U.S.C. 1746, declare as follows:

1. I am the Commanding Officer of Naval Magazine, Indian Island. I have held this position since August 25, 2006. Naval Magazine, Indian Island is located in Port Hadlock, WA. As Commanding Officer, Naval Magazine, Indian Island, I report to Commander, Navy Region Northwest for shore installation management and Commander, Navy Munitions Command CONUS West Division for ammunition operations and explosives safety. Additionally, I am responsible for the safety and security of Naval Magazine Indian Island personnel and property. I have been trained

as an Explosive Ordnance Disposal (EOD) Technician and currently hold the qualification as a Master EOD Technician, the highest qualification within the Department of Defense EOD program. My 20 year career has included positions of significant responsibility within the Navy's explosives management and safety programs including: Ordnance Officer, Naval Weapons Stations Yorktown, VA; Commanding Officer, Explosive Ordnance Disposal Mobile Unit SEVENTEEN, Oak Harbor, WA; and EOD Officer in Charge on board USS Theodore Roosevelt (CVN-71).

2. The statements made in this declaration are based upon my personal knowledge or upon information available to me in my official capacity and are true and correct to the best of my knowledge and belief.

3. The purpose of this declaration is to update my prior declaration dated February 12, 2007 to address the additional allegations raised by the Plaintiff in PLAINTIFF'S OPPOSITION TO DEFENDANT'S SUMMARY JUDGMENT MOTION AND CROSS MOTION FOR SUMMARY JUDGMENT (Plaintiff's Motion), filed with the Court on August 3, 2007.

4. The plaintiff questions why the Navy withheld certain explosive safety documents under FOIA in light of the fact the various DOD and Navy documents regarding explosive safety are unrestricted and freely available. (Plaintiff's Motion at 7; lines 20 - 21) The first document cited by the Plaintiff is *Department of Defense Ammunition and Explosive Safety Standards, DOD 6055.9-STD.* (Milner Declaration at 5; lines 5-15) Plaintiff is

correct; the DOD 6055.9- STD is freely available on the internet, where the Navy's corresponding manual entitled *Ammunition and Explosives Ashore Safety Regulations for Handling Storing and Production Renovation and Shipping*, NAVSEA OP 5 and some of the documents developed in accordance with that manual are not. This reflects intentional decision-making, not happenstance. DOD 6055.9-STD defines minimum explosives safety standards for all the military services. OP-5 is Navy's interpretation and implementation of the DOD requirements to fit Navy's unique land, sea and air requirements not shared by any of the other military services.

5. OP-5, and the products that stem from it (such as ESQD arc maps), can not be less stringent than the standards set in DOD 6055.9. However this Navy-specific explosive safety documents can be, and indeed are, more stringent than DOD 6055.9-STD. To put this is perspective, DOD 6055.9-STD is 265 pages; the OP5 has multiple volumes and is well over 1,000 pages. OP5 (and supporting documents) are also much more rigorous than the DOD 6055.9-STD and are designed to meet our specific mission requirements. For example, unlike other military services, Navy activities have a land-water interface where ships are berthed and munitions loaded creating a significantly greater vulnerability that is addressed in our manual and our supporting documents. Thus, the information in OP5 is more specific and more sensitive.

6. The second document cited by the Plaintiff is the Navy's *Explosive Safety Policy Manual, OPNAVINST 8020.14 dated 1 October 1999.*

(Milner Declaration at 5 and 6; lines 25 - 26 & 1-5) Plaintiff is also correct here; the OPNAVINST is also publicly available. This is a policy manual, not a technical manual such as OP-5. The fact that the Navy policy manual is unrestricted and the Navy's technical manual is restricted reflect conscious decision to make as much explosive safety data available to the public without risking Navy mission or the safety and security of the installation and surrounding communities.

7. Plaintiff also states that he was able to purchase 64 pages of the OP-5 off the internet. (Milner Declaration at 6; lines 5 - 13.) I appreciate Mr. Milner bringing this to our attention. The matter has now been referred to the proper authorities to determine whether any enforcement action should be taken with respect to the disclosure of this document.

8. Plaintiff contends that, even within the limited context of this case, the Navy has been inconsistent, releasing some information and denying similar information. (Milner Declaration at 6; lines 18- 25.) The Navy strives very hard to balance the security and law enforcement needs of the agency with FOIA's goal of "open government." In the context of this case, the Navy has carefully examined every document under dispute and released as much information as possible. The Navy has taken great pains to withhold only those documents identified on the Vaughn Index to those which present the greatest risk if released. What appears to Mr. Milner to be inconsistency is actually a reflection of careful and deliberate decisions on the made by the Navy to attempt to provide the public

with as much information as possible without jeopardizing Navy operations or the safety of naval personnel and the public.

9. Plaintiff also states that "ammunition is routed by railcars to Bangor and sent by truck to Indian Island. This activity is described in a January 13, 1995 document [which was released to him by the Navy under FOIA]." As explained in my original declaration filed with this Court, I do not know why this document and others like it were released. However, if the decision were mine to make today, given the current state of tensions in the world, I would strike the balance differently and withhold parts of the document, including any renderings of ESDQ arcs.

10. Finally, the plaintiff states that "the map (at Johnson Declaration Exhibit 2) shows that the Navy handles and stores explosives in a manner that places much of Port Townsend at risk of harm from an explosion." (Plaintiff's Motion at 4; lines 13 - 15.) This statement is untrue and, in my opinion, irresponsible. The entire explosive safety program is designed to protect not only my employees and property but also surrounding communities. The formula that is used to develop ESQD arcs intentionally lays one conservative assumption upon another in order to create the maximum buffer for safety. ESQD arcs are not designed to show how, when or where the Navy operates; they are designed to be a long term planning tool for the Navy. In addition, ESQD arcs are not the only tool the Navy has to maximize safe operations and minimize risks. The Department of Defense explosive safety program is replete with tools to improve the overall

effectiveness of explosives safety. For example, all ammunition and explosives are designed with failsafe arming and insensitive explosives which can be subjected to the extreme environments of combat operations. Additionally, all ammunition fuzing and arming devices are stored and maintained separately from the actual weapon until ready for use. This reduces the risks of any inadvertent arming if failsafe devices malfunction. Lastly, personnel assigned to handle ammunition and explosives must undergo extensive training and qualification processes before they can handle any type of explosives. Random drug testing is conducted on all workers who handle ammunition and explosives and I strongly maintain the Navy's policy of zero tolerance on any type of drug use discovered during random sampling. Using a layered safety approach to explosives safety has been my approach throughout my 20 years of working with ammunition and explosives. Numerous safety inspections and internal self assessments coupled with continual safety process improvements has become the culture of the workforce and the way of doing business.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

[SIGNATURE OMITTED]
GEORGE N. T. WHITBRED IV

Executed this 10th day of August 2007.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

GLENN SCOTT MILNER,)
)
Plaintiff,)
)
v.) Civil Action No.
) CV6 1301
)
DEPARTMENT OF NAVY,)
)
Defendant.)
)

DECLARATION OF DONALD E. KLEIN

I, DONALD E. KLEIN, pursuant to the provisions of 28 U.S.C. 1746, declare as follows:

1. I am the Project Manager for the Regional Shore Installation Management System (RSIMS) for the Pacific Northwest. I work for the Naval Facilities Engineering Command Northwest. I have held this position since August 2005.

2. The statements made in this declaration are based upon my personal knowledge or upon information available to me in my official capacity and are true and correct to the best of my knowledge.

3. The purpose of this declaration is to address certain statements made in PLAINTIFF'S OPPOSITION TO DEFENDANT'S SUMMARY JUDGMENT MOTION AND CROSS MOTION FOR

SUMMARY JUDGMENT, filed with the Court on August 3, 2007 (Plaintiff's Motion), and the DECLARATION OF GLEN SCOTT MILNER, dated 2 August 2007 (Milner Declaration).

4. Plaintiff states that "ESQD arcs are not hard to find. A Navy Region Northwest document titled "GIS-Portal integration" is available to the public (on the internet). Pages 8, 9, 10 and 11 ... show ESQD arcs for Indian Island ..." (Milner Declaration as 7 - 8; lines 25 - 26 and 1 - 6.).

5. In March 2006, I gave a presentation regarding the Commander Navy Region Northwest's Regional Shore Installation Management System (RSIMS2) GIS at a conference entitled *Joint Services Environmental Management*. This conference was located in Denver, CO and hosted by the U.S. Army. While the examples I used in the presentation were intended to be hypothetical, I incorporated some real-life data into my presentation. Presenters were required to submit presentations electronically in advance. When I submitted my presentation, I had not realized that my presentation would be made available to the public after the conference was over. Had I known, I would not have submitted my presentation in that form.

6. The regional RSIMS2 application was taken offline in November 2006. However, when the system was active, it was not open to the public. In order to have access the user was required to request an account, be authenticated, and required a login and password to access the system. If the system is activated again in the future, it will have similar controls.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

[SIGNATURE OMITTED]
DONALD E. KLEIN

Executed this 13th day of August 2007

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

GLENN SCOTT MILNER,)
)
Plaintiff,)
)
v.) Civil Action No.
) CV6 1301
)
DEPARTMENT OF NAVY,)
)
Defendant.)
)

DECLARATION OF STEPHEN M. SMITH

I, STEPHEN M. SMITH, pursuant to the provisions of 28 U.S.C. 1746, declare as follows:

1. I am the Emergency Management Officer at Naval Magazine Indian Island. My duties include, providing advice, coordination, training, and logistical support for emergency planning, preparedness, mitigation, response and recovery operations. This may also include crisis management with transition through the final stages of consequence management. I have held this position since April 2005.

2. The statements made in this declaration are based upon my personal knowledge or upon information available to me in my official capacity and are true and correct to the best of my knowledge.

3. The purpose of this declaration is to address certain statements made in PLAINTIFF'S OPPOSITION TO DEFENDANT'S SUMMARY JUDGMENT MOTION AND CROSS MOTION FOR SUMMARY JUDGMENT (Plaintiff's Motion), filed with the Court on August 3, 2007, and addresses the statements in the DECLARATION OF PHILLIP JOHNSON IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT, dated 23 April 2007.

4. Plaintiff states the Navy had given a map which is attached to the Johnson Declaration as Exhibit 2 to Commissioner Johnson. (Plaintiff's Motion at 4; lines 11 -12.). Plaintiff also states that "Johnson ... had no trouble obtaining the ESQD arc map of Indian Island. (Plaintiff's Motion at 7; lines 18- 20.) Phillip Johnson states that "Exhibit 2 is a true and complete copy of the map of Explosive Safety Distance arcs that was provided to me by the United States Navy." (Johnson Declaration at 1; lines 21-23.) None of these statements are true.

5. In July 2006, a meeting was held at Naval Magazine Indian Island to discuss the ESQD arcs associated with Naval Magazine Indian Island. Among others, in attendance were Mr. Robert Hamlin, Director, Jefferson County, Department of Emergency Management and myself. During the meeting, Mr. Hamlin asked for a copy of some of the materials presented by the Navy, including a map showing K-50 Inhabited Building Distance, ESQD, arcs. It is Department of Defense and Department of Navy policy to share relevant explosive safety information with municipalities for their official use. In accordance with those policies, CAPT Kurtz, then

Commanding Officer of the base, instructed me to make a copy of the K-50 map and Exhibit 2 and share it with Mr. Hamlin, who is my counterpart at the County. Exhibit 2 is not an ESQD arc map in the classic sense. Instead it represents the explosive arcs specific to individual magazines containing a Net Explosive Weight (NEW) on any given day. The date we choose for illustrative purposes was 20 July 2006. The arcs shown on Exhibit 2 are those closest to the City of Port Townsend.

6. I hand carried these documents to Mr. Hamlin's office in Port Hadlock. As best as I can recall, that occurred the week of 24 July 2006. When I got to Mr. Hamlin's office, I realized that while the large map was clearly marked "For Official Use Only", Exhibit 2 to the Johnson Declaration was not. I am reasonably sure I wrote "For Official Use Only" on Exhibit 2 while I was in Mr. Hamlin's office. I specifically recall that I stressed verbally that both documents were "For Official Use Only" and the Navy is sharing this material for governmental purposes only.

7. Within days of sharing this information, I discovered that Mr. Hamlin had given Exhibit 2 to Mr. Johnson and that Mr. Johnson in-turn gave copies to Mr. Milner as well as, possibly, to several members of the public. Mr. Johnson's disclosure to members of the public was inconsistent with the terms under which these documents were provided to the Jefferson County, Department of Emergency Management and violated the duty of confidentiality which I believe they had undertaken when they accepted the documents.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

[SIGNATURE OMITTED]
STEPHEN M. SMITH

Executed this 10th day of August 2007

PETITIONER'S BRIEF

No. 09-1163

Supreme Court, U.S.
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In The
Supreme Court of the United States

GLEN SCOTT MILNER,

Petitioner,

v.

UNITED STATES DEPARTMENT OF THE NAVY,

Respondent

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITIONER'S BRIEF ON THE MERITS

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QUESTION PRESENTED

FOIA Exemption 2 exempts from disclosure documents "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2). The judicially created "High 2" exemption applies to materials that are not related solely to internal employee relations, but that are "predominantly internal" and their disclosure "would present a risk of circumvention of agency regulation." Does High 2 exceed the scope of FOIA Exemption 2?

PARTIES TO THE PROCEEDINGS

The caption of the case contains the names of all parties.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 3

A. Indian Island 4

B. ESQD Data 5

C. Milner's FOIA Request and Response 6

D. Proceedings Below 7

SUMMARY OF THE ARGUMENT 10

ARGUMENT 13

A. FOIA Exemption 2 Allows Agencies to Withhold Only Routine Internal Employee Relations Matters That Are of No Public Interest 13

1. The Goal of FOIA Is To Open Agency Action to the Light of Public Scrutiny 13

2. High 2 Conflicts with the Plain Language of Exemption 2 14

3 The Legislative History Behind Exemption 2 Does Not Support High 2 19

4 The Policy Concerns that Informed *Crooker* Were Resolved by Congress in Its 1986 Amendment to Exemption 7 30

B Even If the Court Finds Room for a High 2 Exemption the Court Should Sharply Limit the Exemption 36

CONCLUSION 39

TABLE OF AUTHORITIES

Page

Cases

14 Penn Plaza, LLC. v Pyett,
___ U.S. ____, 129 S Ct 1456 (2009) 15

Audubon Soc v U S. Forest Service,
104 F.3d 1201 (1997) 19

Caplan v. Bureau of Alcohol, Tobacco & Firearms,
587 F.2d 544 (2nd Cir. 1978) 30, 32

Chevron U S.A. v. Echazabal,
536 U S. 73 (2002) 24

Connecticut Nat. Bank v. Germain,
503 U S. 249 (1992) 15

Crooker v. Bureau of Alcohol, Tobacco & Firearms,
670 F 2d 1051 (D.C. Cir. 1981) . ... passim

Dep't of the Air Force v. Rose,
425 U.S. 352 (1976) .... passim

Eldred v Ashcroft,
537 U.S. 186 (2003) 26

Engine Mfrs. Assn. v. South Coast Air Quality Management Dist ,
541 U S. 246 (2004) 17

Environmental Protection Agency v. Mink,
410 U S. 73 (1973) 14, 20

FBI v Abramson,
456 U.S. 615 (1982) 14, 32

Hardy v Bureau of Alcohol, Tobacco and Firearms,
631 F.2d 653 (9th Cir 1980) 30, 32

Jordan v. U S Dep't of Justice,
591 F.2d 753 (D.C Cir 1978) 18, 19, 23, 34

Kaganove v. U.S. EPA,
856 F.2d 884 (7th Cir 1988) 33

Milner v. U S Dep't of the Navy,
2007 WL 3228049 (W.D.Wash. 2007). 1

Milner v. U.S. Dep't of the Navy,
575 F.3d 959 (9th Cir 2009). . ... passim

National Transportation Employees Union v. U S. Customs Service,
802 F 2d 525 (D.C. Cir. 1986) 38

NLRB v. Robbins Tire & Rubber Co.,
437 U.S. 214 (1978) 13

Piper v. Chris-Craft Industries, Inc.,
430 U.S 1 (1977) 30

Ratzlaf v. U.S,
510 U.S. 135 (1994) 20

Rose v. Dep't of Air Force,
495 F 2d 261 (2nd Cir. 1974) 16

Schiller v. NLRB,
964 F.2d 1205 (D.C. Cir. 1992) 38

Scripps-Howard Radio v. FCC,
316 U.S. 4 (1942) 30

U.S Dep't of Justice v Tax Analysts,
492 U S. 136 (1989) 14

Vaughn v. Rosen,
523 F.2d 1136 (D C. Cir 1975) . . . . passim

Statutes

28 U S C. § 1254(1) 1

5 U.S C. § 1002 (1964) 14, 20

5 U.S.C § 552 3

5 U S C. § 552(a)(3) 6

5 U S C. § 552(a)(4)(B) 1

5 U.S.C § 552(b) 2, 13

5 U.S C. § 552(b)(1) 6, 35

5 U.S.C. § 552(b)(2) .... passim

5 U S.C § 552(b)(3) 7, 35

5 U.S.C. § 552(b)(7) (1966) 25

5 U.S.C. § 552(b)(7)(E) 33

5 U.S C § 552(b)(7)(F) 7

5 U.S C. § 552(c) 14

Other Authorities

132 Cong Rec. H9462-68 (daily ed. (Oct. 8, 1986)) 34

132 Cong Rec S13648, 13660-13661 (daily ed (Sept. 25, 1986)) 34

Davis, K., Administrative Law Treatise, § 3A 31 (1970 Supp) at 174-176 23

Davis, K., Pierce, R., Administrative Law Treatise, § 5.8 (1994) 35

Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527 (1947) 32

H Rep. No 89-1497 (1966) 20

House Hearings on H.R 5012, at 29-30. 28

New Webster's Dictionary of the English Language (1981) 18, 19

Pub. L. No. 99-570, 100 Stat. 3207 33

S Rep No 89-813 (1965) 20

S. Rep. No 98-221 (1983). 33, 34

OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit (Pet. App. 26-64) is reported at *Milner v. U.S. Dep't of the Navy*, 575 F.3d 959 (9th Cir 2009) The decision of the United States District Court for the Western District of Washington (Pet App 4-25) is available at *Milner v. U.S. Dep't of the Navy*, 2007 WL 3228049 (W D Wash 2007).

JURISDICTION

The District Court had jurisdiction under 5 U.S.C § 552(a)(4)(B). The Court of Appeals issued a decision affirming the District Court on August 5, 2009 Petitioner Milner's motion for reconsideration en banc was denied by the Court of Appeals by order entered on December 22, 2009 This Court has jurisdiction under 28 U S.C. § 1254(1).

STATUTORY PROVISIONS

5 U.S.C. § 552(b) of the Freedom of Information Act ("Exemption 2") provides in pertinent part.

(b) This section [providing for public access to government documents] does not apply to matters that are:

. .

(2) related solely to the internal personnel rules and practices of an agency;

STATEMENT OF THE CASE

The Freedom of Information Act, 5 U.S.C § 552 ("FOIA"), allows citizens to access government documents unless one of nine narrowly-tailored and strictly-construed exemptions applies. Exemption 2 exempts from disclosure only those documents "related solely to the internal personnel rules and practices of an agency." Glen Milner requested maps showing how far an explosion would travel from the U S Navy's Naval Magazine Indian Island into the surrounding public waters, property and community The Navy refused to release the maps. The Ninth Circuit upheld the Navy's refusal based on the judicially-created "High 2" reading of Exemption 2

The High 2 exemption allows an agency to withhold documents that are not related solely to internal employee relations, but that are "predominantly internal" and their "disclosure presents a risk of circumvention of agency regulation." This case presents the question of whether the High 2 exemption exceeds the scope of FOIA Exemption 2 and whether Navy maps and data showing the extent of a possible explosion and its effects on private and public property are exempt from disclosure under FOIA Exemption 2. 5 U S.C. § 552(b)(2)

A. Indian Island

The Navy maintains non-nuclear explosives in three Naval Magazines located in different parts of the country. Naval Magazine Indian Island ("Indian Island") is an ammunition and explosives depot located very near the communities of Port Hadlock and Port Townsend in the Puget Sound area of Washington. Indian Island is a small island sandwiched between the densely populated mainland and inhabited Marrowstone island, including the community of Nordland. Indian Island is connected to both the mainland and Marrowstone Island via a public highway. J. App 6-7, 71-72. Although the grounds of Indian Island itself are restricted, civilian boaters occasionally enter along beaches to collect clams, and Native Americans have treaty rights to collect shellfish in the area J App 6-7. Fort Flagler State Park is a few hundred feet from the north end of the island. *Id.* The water between the island and mainland is part of the Puget Sound, and open to boating.

The Navy does not hide the presence of Indian Island, nor does it deny that explosives are stored there J App 54 The Navy has released a map of the island, including the specific locations of ammunition storage buildings. J App. 71.

B. ESQD Data

The Navy creates and maintains Explosive Safety Quantity Distance (ESQD) data for explosives storage facilities. An ESQD is the distance an explosion is expected to expand should a particular explosive or combination of explosives detonate. J. App. 57-59. ESQD data is created specifically for safety reasons. "Explosive Quantity-Distance requirements and explosives standards are designed to provide the inhabitants of nearby communities, the personnel of Department of Defense shore activities and adjacent public and private property owners reasonable safety from serious injury or destruction from fires or explosions " J App. 58.

ESQD data is shared externally; as part of its safety preparations, the Navy "sometimes share[s] ESQD information" with civilians if their FOIA "request supports a legitimate government purpose[ ]" J App 59 For some facilities, including nearby submarine base Naval Base Kitsap-Bangor (Subbase Bangor), naval commanders release the data pursuant to the "legitimate government purpose" of a FOIA request. J App. 59. Nationwide, other military commanders recognize that local citizens need to know the blast radius so that they can keep themselves safe J. App 60 *See also,* ER 0054-0057 The Navy has released numerous documents relating to ESQD arcs and their calculations, including some on the Navy's website, and ESQD arc maps for Subbase Bangor. *Id* Indian Island previously shared ESQD data with "first responders" at both Jefferson County and the City of Port Townsend. J. App. 59. A previous version of the ESQD map for Indian Island showing the blast radius of the items stored in each of the buildings at Indian Island was published in a local newspaper. ER 0058; J App. 52

C. Milner's FOIA Request and Response

Glen Milner is a Puget Sound resident who wanted information on the risk of harm Indian Island posed to nearby communities, including boaters that recreate in the waters surrounding Indian Island. ER 0050-0052 Mr. Milner filed a FOIA request under 5 U S.C § 552(a)(3), to find out what areas were within the blast radius of Indian Island, should an accident occur ER 0051; ER 0059-0061. With this knowledge, he could know whether nearby homes were at risk, whether he could safely boat near Indian Island; or whether, should he see a fire break out, he should leave the area

The Navy refused to release ESQD maps and data for Indian Island claiming they were exempt from disclosure under FOIA Exemptions 1, 2, 3 and 7(F)[1] ER 0052. Indian Island's Commanding

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[1] Exemption 1 is for classified national security documents 5 U S C § 552(b)(1) The Navy has abandoned the claim that Exemption 1 applies to Indian Island records, since the documents in question are not classified.

Officer decided that granting Mr Milner's request "would do little or nothing to promote the purpose of democratic oversight which is at the heart of the Freedom of Information Act." J App. 62-63

D. Proceedings Below

A divided panel of the Ninth Circuit affirmed an unpublished district court decision and upheld the Navy's withholding of the ESQD maps and data under the High 2 exemption. *Milner v. U.S. Department of the* Navy, 575 F.3d 959 (9th Cir. 2009) According to the Ninth Circuit, FOIA Exemption 2 contains two separate exemptions – "Low 2" and "High 2." *Id.* at 963. Quoting from this Court's opinion in *Dep't of the Air Force v. Rose,* 425 U.S 352, 363 (1976), the Ninth Circuit found that "Low 2" applies to materials concerning "mundane employment matters such as parking facilities, lunch hour, and sick leave, which are not of 'genuine and significant public interest' " 575 F.3d at 963. The court found that the High 2 exemption covered "more sensitive government information." *Id.* The court held that the High 2 exemption applies to documents

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Exemption 3 covers information exempted by other statutes 5 U S C. § 552(b)(3) The Navy similarly abandoned its claim that the requested documents were covered under Exemption 3 Exemption 7(F) covers "records or information compiled for law enforcement purposes" that if disclosed "could reasonably be expected to endanger life or physical safety of any individual." *Id* , § 552(b)(7)(F).

that are "predominantly internal and [their] disclosure presents a risk of circumvention of agency regulation." *Id.* at 968. While citing *Rose* also as authority for High 2, the Ninth Circuit "formally endorsed" the D.C Circuit's analysis and conclusion in *Crooker v Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051 (D C. Cir 1981) (en banc).

Turning to the merits, the Ninth Circuit found that the ESQD data and maps were "predominantly internal" because: they are required by Navy operational requirements; Navy personnel are "bound to follow" them when handling and storing explosives; and they are "used by its personnel" when designing explosive storage facilities and organizing ammunition operations. 575 F.3d at 968 The Ninth Circuit ignored entirely that one of the most important purposes behind the ESQD data is to "provide the inhabitants of nearby communities, the personnel of Department of Defense shore activities and adjacent public and private property owners reasonable safety from serious injury or destruction from fires or explosions . . ." J App. 58. Instead, the court found that the ESQD data and maps are not "written to regulate the public," and "[n]othing about the data *could* be codified in any logical way to regulate public behavior, and the Navy has not attempted to do so." 575 F 3d at 969. Consequently, the court concluded that the information was "predominantly internal." *Id* (emphasis in original). The Ninth Circuit concluded also that release of the ESQD maps and data might "risk circumvention of agency regulation" by "point[ing] out the best targets for those bent on wreaking havoc." *Id* at 971. The court failed to mention that the Navy fully acknowledges that it stores explosives at Indian Island or that the Navy has released maps showing the location of ammunition storage buildings. The court failed also to cite any Navy regulation or law that release of the data would circumvent.

The dissent, authored by Judge William Fletcher, agreed both with the Ninth Circuit's adoption of High 2 and the reasoning in *Crooker*, and with the court's determination that the ESQD data and maps were "predominantly internal." 575 F 3d at 976. Judge Fletcher "strongly disagree[d]," however, with the majority's determination that release of the ESQD maps and data would "risk circumvention of agency regulation." *Id.* Judge Fletcher explained that *Crooker* and the "consistent line of cases" decided after *Crooker* confirmed that High 2 "applies only to documents whose release would risk circumvention *by a regulated person or entity.*" *Id* at 978 (emphasis in original). Judge Fletcher concluded that High 2 did not protect the ESQD data because "[t]he Navy is not acting as a regulatory or law enforcement agency and the arc maps do not regulate anyone or anything outside the Navy itself." *Id.*

The Ninth Circuit rejected a request for a rehearing en banc, and Mr Milner timely petitioned for a writ of certiorari. This Court granted Certiorari on June 28, 2010.

SUMMARY OF THE ARGUMENT

The Court should hold that there is no High 2 exemption to FOIA and that Exemption 2 is limited solely to routine internal employee relations matters that are of no public interest.

Congress created FOIA with a general philosophy of full agency disclosure of information unless the information is exempt under one of nine clearly delineated exemptions. FOIA's exemptions are to be narrowly construed, and plain language must be given its ordinary meaning Exemption 2 allows agencies to withhold material "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2) In *Rose*, this Court concluded that Exemption 2 was not designed to authorize withholding of material where there is genuine public interest Instead, Exemption 2 applies only to routine matters with "merely internal significance" *Rose*, 425 U S at 370. Because it was irrelevant to the case, the Court expressly declined to rule whether Exemption 2 might also exempt nontrivial materials, the release of which might risk circumvention of agency regulation. *Id*. at 369.

Despite the narrow plain language of Exemption 2, and this Court's narrow reading of the exemption in *Rose*, some circuits seized upon this

Court's dictum and created a High 2 reading of Exemption 2. In this case, the Ninth Circuit formally adopted, and expanded upon, the D.C. Circuit's formation of the High 2 exemption in *Crooker* and ruled that a government agency could keep secret any document that is "predominantly internal and its disclosure presents a risk of circumvention of agency regulation." *Milner*, 575 F.3d at 968. This judicially-created High 2 reading of Exemption 2 is a significant departure from the plain language of Exemption 2, and represents a departure even from the dictum in *Rose*.

The failure to adhere to FOIA's plain language has far-reaching implications The slippery slope of the High 2 exemption is patent. It is too easy for agencies to determine that almost all materials are "predominantly internal" so long as they were produced by the agency for agency use. Moreover, there is little data that does not have some potential impact on an agency's operation, and could thus be used to help "circumvent" agency operations The Ninth Circuit's decision below represents the capstone of judicial expansion of Congress's narrow wording in Exemption 2. Although lip service is still paid by most courts to the words "internal personnel," the application of the High 2 exemption far exceeds the "routine matters" and "no public interest" standards set by this Court in *Rose*. In this case the Ninth Circuit has sanctioned nondisclosure of maps showing how far an explosion will go into the surrounding community, regardless of its complete lack of application to any personnel issues other than that it was used by government employees. Moreover, the maps do not "regulate" the affected community, nor is the Navy acting as a regulatory or law enforcement agency while implementing the maps. The Ninth Circuit's adoption and expansion of High 2 creates the vague and undefined exemption FOIA was enacted to eliminate

The plain language of Exemption 2 limits withholding solely to routine internal employee relations matters. The High 2 exemption conflicts with the plain language, is not supported by the legislative history, represents outcome-based judicial legislation and is unnecessary in light of other express statutory exemptions *Milner v U.S. Department of the Navy* should be reversed This Court should hold that there is no High 2 exemption to FOIA and that Exemption 2 is limited solely to routine internal employee relations matters that are of no public interest.

ARGUMENT

A. FOIA Exemption 2 Allows Agencies to Withhold Only Routine Internal Employee Relations Matters That Are of No Public Interest

1. The Goal of FOIA Is To Open Agency Action to the Light of Public Scrutiny.

Congress created FOIA with a "general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language" *Rose,* 425 U S. at 360-61 (internal quotations omitted). FOIA's goal is therefore "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." *Id* at 361 (internal quotation omitted) Its purpose "is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U S. 214, 242 (1978).

FOIA's policy of full disclosure precludes judicial creation of new exemptions. Agencies may withhold requested documents only if they fall under one of nine enumerated exemptions from mandatory disclosure 5 U.S.C § 552(b) These exemptions "must be narrowly construed." *Rose*, 425 U.S at 361. As this Court has noted, FOIA's exemptions were "explicitly made exclusive, and are plainly intended to set up concrete, workable standards for determining whether particular material may be withheld or must be disclosed." *Environmental Protection Agency v. Mink*, 410 U.S. 73, 79 (1973) (citing 5 U.S.C. § 552(c)). Indeed, the narrow wording of each exemption was explicitly designed by Congress to counteract the "vague phrases" that had turned its predecessor, Section 3 of the Administrative Procedures Act, 5 U.S.C. § 1002 (1964), into more of "a withholding statute than a disclosure statute." *Mink*, 410 U.S. at 79 "Consistent with the Act's goal of broad disclosure, these exemptions have been consistently given a narrow compass." *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S 136, 151 (1989), *see also*, *FBI v Abramson*, 456 U.S. 615, 630 (1982) ("FOIA exemptions are to be narrowly construed"). The nine exemptions "do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Rose*, 425 U.S. at 361.

2. High 2 Conflicts with the Plain Language of Exemption 2.

This case should start and end with the plain language of the statute As this Court has often repeated, "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this canon is also the last: judicial inquiry is complete." *Connecticut Nat.*

Bank v. Germain, 503 U.S. 249, 253-54 (1992) (internal citations and quotations omitted). *Cf., 14 Penn Plaza, LLC. v. Pyett*, ___ U.S ____, 129 S. Ct 1456, 1465, n. 6 (2009) (House Report that contradicts the plain language cannot be used to cloud clear statutory text.) Exemption 2 to FOIA is short. Exemption 2 provides that an agency may exempt from mandatory disclosure only records that are "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2). Nothing in this short statement supports defining Exemption 2 to cover records that are "predominantly internal" and whose release "would risk circumvention of agency regulation."

The Court first considered Exemption 2 in its 1976 opinion in *Rose*, 425 U.S 352. *Rose* concerned a request by law review editors for case summaries of Air Force Academy honors and ethics hearing summaries The Air Force withheld their release under Exemption 2. While disciplinary hearing summaries clearly were "personnel" related, the Court ordered their release, finding that there was a strong public interest in the operation of the Academy's Honors and Ethics Codes as they affected the training of future Air Force officers and therefore elevated the requested hearing summaries into something more than the types of internal personnel matters covered by Exemption 2. As the Court explained, the high level of public interest "differentiate(s) the summaries from matters of daily routine like working hours, which, in the words of

Exemption Two, do relate 'Solely to the internal personnel rules and practice of an agency.' " *Id.* at 369 (quoting from Court of Appeals opinion, *Rose v. Dep't of Air Force,* 495 F 2d 261, 265 (2nd Cir 1974))

In *Rose,* this Court held that Exemption 2 "is not applicable" to matters subject to "a genuine and significant public interest." 425 U.S at 369. To the contrary, the "thrust of the exemption is simply to relieve agencies of the burden of assembling and maintaining for public inspection matter in which the public could not reasonably be expected to have an interest." *Id.* at 369-70. Consistent with *Rose,* Exemption 2 should be limited to routine employee relations matters. The "routine matters" test set forth in *Rose* accurately encompasses the plain language of the statute. A government agency should not have to spend government resources responding to frivolous requests; the purpose of FOIA is to shed a light on the workings of government of significance to citizens. But there is nothing in the plain language of Exemption 2 suggesting that it was intended to shield anything other than solely internal employee relations matters into which the public could not have a legitimate reason to inquire

Statutory construction must begin with the words used by Congress and assume that the ordinary meaning of the words used express the legislative purpose. *Engine Mfrs. Assn. v South Coast Air Quality Management Dist.,* 541 U S. 246, 252 (2004). The *Crooker* court violated this basic tenet by both substituting words and adding new words The High 2 exemption, as articulated by the D C. Circuit in *Crooker*, and now adopted by the Ninth Circuit, substitutes the phrase "related solely to the internal personnel rules and practices of an agency," 5 U S.C § 552(b)(2), with a new two-prong test: "predominantly internal," the release of which "risks circumvention of agency regulation." Neither prong of this new test is supported by the language of Exemption 2.

After first correctly noting that the statutory phrase "'relating solely to' limits Exemption 2 to matters that are truly internal, and not of legitimate public interest," the *Crooker* majority proceeded to substitute "related solely to" with "predominantly" internal 670 F.2d at 1056 The court's reasoning was that "solely" was too restrictive, or "potentially all-excluding "[2] *Crooker*, 670 F 2d at 1056-57. Relying on the concurring opinion in *Vaughn v. Rosen*, 523 F.2d 1136 (D C Cir. 1975), *Crooker* attempted to justify its substitution by breaking the phrase "related solely to" down into two separate words, "related" and "solely" and defining each in isolation, thereby producing a seeming contradiction. 670 F.2d at 1056 (citing *Vaughn*, 523 F.2d at 1150-51 (Leventhal, J., concurring). But no such contradiction exists. Read together, "related solely to" is not contradictory "Solely" is a modifier of "related" and serves to "emphasize the limited scope" of the exemption. *See Jordan v. U.S. Dep't of Justice*, 591 F 2d 753, 763 (D C. Cir. 1978) (en banc).[3] Moreover, "solely" is a profoundly different word than "predominantly." "Solely," the word actually used in 5 U.S.C. § 552(b)(2), means "exclusively or only" or "wholly" or "merely." *New Webster's Dictionary of the English Language* (1981). "Predominantly," on the other hand, means "prevalent over others " *Id* In context, a document is "solely" internal if it is exclusively, wholly or merely internal.[4] But a "predominantly" internal document needs only be more internal than not [5] Congress's words were plain – in order for materials to fit within the narrow meaning of Exemption 2, they had to be materials related "solely" or "only" or "merely" to internal personnel matters.

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[2] As the dissent in *Crooker* characterized it, "predominantly" is a "much more malleable word that enables a court to support whatever result it finds desirable " 670 F 2d at 1095 (Wilkey, J , dissenting)

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[3] In *Jordan* the D C. Circuit court addressed a request by Georgetown law students for documents related to the exercise of prosecutorial discretion used by the U.S Attorney's office The Department of Justice withheld release pursuant to Exemption 2 The D C Circuit agreed with this Court's narrow reading of Exemption 2 in *Rose* and rejected the Department's claim that this Court had implied that Exemption 2 might cover documents where "disclosure may risk circumvention of an agency regulation "

[4] This Court used "merely internal" in its opinion in *Rose* 425 U S at 369-70.

[5] Changing "solely" to "predominantly" is no different than changing "beyond a reasonable doubt" to "preponderance of the evidence "

There is similarly no basis supporting the addition of the "risk of circumvention" prong of High 2 to the plain words of Exemption 2. To the contrary, Exemption 2 is limited to "internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2). The term "internal," meaning "of or pertaining to the inside or inner part," *New Webster's Dictionary of the English Language* (1981), modifies "personnel," meaning "the body of persons engaged or employed in any occupation." *Id.* "[P]ersonnel rules or practices of an agency" logically refers to "those rules and practices that concern relations among employees of an agency, as distinct from rules and practices that might relate to, or have a more direct impact upon, members of the public " *Jordan,* 591 F.2d at 763 *Cf*, *Audubon Soc. v U S Forest Service,* 104 F.3d 1201, 1204 (1997) ("proper inquiry is not whether the maps showing locations of endangered spotted owls relate to the 'agency practices,' but whether they relate to the "*personnel* practices of the Forest Service") (emphasis in original)

This case should start and end with the plain language of the statute. The plain language of Exemption 2 limits the exemption solely to internal routine rules and practices that concern agency employee relations.

3. The Legislative History Behind Exemption 2 Does Not Support High 2.

The purpose of reviewing legislative history is to clarify the meaning of an ambiguous statute – not to create further ambiguity. *Ratzlaf v. U.S.*, 510 U.S. 135, 147-48 (1994). The plain language of Exemption 2 is unambiguous and limited solely to internal routine employee relations matters. To the extent legislative history is necessary, or even at all relevant, it supports the plain language and not High 2. Nowhere in the legislative history is there any support that, by saying "related solely to the internal personnel rules and practices," what Congress actually meant was "predominantly internal and its disclosure presents a risk of circumvention of agency regulation." *Milner,* 575 F.3d at 968.

As this Court first discussed in *EPA v. Mink*, 410 U.S. at 79-80, FOIA was adopted as a replacement for Section 3, the "public disclosure" section, of the Administrative Procedures Act, 5 U.S.C. § 1002 (1964) which was "generally recognized as falling far short of its disclosure goal and came to be looked upon more as a withholding statute than a disclosure statute." 410 U.S. at 79 (citing, S. Rep. No. 89-813, at 5 (1965); H. Rep. No. 89-1497, at 5-6 (1966)) In *Rose*, the Court focused more specifically on Exemption 2 and recognized that it was "traceable to congressional dissatisfaction" with the former APA Section 3 exemption for "any matter related solely to the internal management of an agency." 425 U.S. at 362 (citing 5 U.S.C. § 1002 (1964)). As the Court explained, "the sweep of that wording led to withholding by agencies from disclosure of matter 'rang(ing) from the important to the insignificant.' " *Id.* (citing H. Rep. No. 89-1497 at 5).[6] As a result, the Court concluded that "legislative history plainly evidences the congressional conclusion that the wording of Exemption 2, 'internal personnel rules and practices' was to have a narrower reach than the Administrative Procedure Act's exemption for 'internal management' matters." 425 U.S. at 363.

After confirming congressional intent to narrow withholding of internal personnel matters, the Court next turned to the contradictory Senate and House reports. 425 U.S. at 363. According to the Senate Report:

> Exemption No. 2 relates only to the internal personnel rules and practices of an agency. Examples of these may be rules as to personnel's use of parking facilities or regulation of lunch hours, statements of policy as to sick leave, and the like.

---

[6] *See, e.g.*, *Vaughn*, 523 F.2d at 1149-1150 ("The FOIA was meant to abolish the old "internal management exception, which apparently operated as a license for bureaucratic secrecy[.]") (Wilkey, J.), *id.* at 1149-50 (Leventhal, J., dissenting).

S. Rep. No. 89-813. The House Report, on the other hand, takes a broader stance and provides that Exemption 2 applies to:

> Matters related solely to the internal personnel rules and practices of any agency: Operating rules, guidelines, and manuals of procedure for Government investigators or examiners would be exempt from disclosure, but this exemption would not cover all "matters of internal management" such as employee relations and working conditions and routine administrative procedures which are withheld under present law.

H. Rep. No. 89-1497.

In deciding between the two Reports, the Court noted first that "[A]lmost all courts that have considered the difference between the Reports have concluded that the Senate Report more accurately reflects the congressional purpose." *Id.* at 363 This Court agreed and concluded that the narrower Senate version is the more authoritative and controlling. The Court then unequivocally endorsed and quoted extensively from the D C Circuit's 1975 opinion in *Vaughn*, including specifically *Vaughn*'s analysis that the Senate Report was prepared prior to both houses passing the legislation and thus available to both, while the House Report was prepared *after* the Senate had already passed the

Senate Bill and thus was not available to the Senate. 425 U.S. at 364-66 (quoting *Vaughn*, 523 F.2d at 1142).[7] The Court agreed with *Vaughn* that the "recognized principal purpose of FOIA" required choosing the interpretation "most favoring disclosure" and that therefore the Senate Report controlled. 425 U.S. at 366-67.

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[7] As one noted commentator described.

> After the bill had passed the Senate on the basis of a committee report that was reasonably faithful to the words of the bill, the House committee was subjected to pressures to restrict the disclosure requirements. It yielded to the pressures. But it did not change the bill. Instead, it wrote the restrictions into the committee report. These restrictions differ drastically from the bill as passed by the Senate, they often contradict the words of the bill, and they sometimes contradict both the statutory words and the Senate Committee report."
>
> "I believe (a) that statements in the House committee report that contradict the bill and depart from the understanding of the Senate committee are not the law, and (b) that inserting such statements into a committee report, instead of changing the bill, is a clear abuse."

Davis, K., Administrative Law Treatise, § 3A.31 (1970 Supp.) at 174-176.

Contrary to this Court's decision to rely on the Senate Report, and contrary to its earlier decisions in *Vaughn* and *Jordan*, the D.C. Circuit in *Crooker* implicitly gave greater weight to the House Report in order to fit Department of Alcohol, Tobacco and Firearm's training manuals within Exemption 2's narrow language According to *Crooker*, the House Report's statement that Exemption 2 covers matters such as "manuals of procedure for Government investigators or examiners – is uncontroverted by the Senate Report " *Crooker*, 670 F.2d at 1061 In other words, since the Senate Report did not expressly state that investigative manuals were *not* included within Exemption 2, it somehow confirms that they were. This interpretation, of course, directly conflicts with one of the fundamental rules of statutory construction – *Expressio unius est exclusio alterius* – expressing one item of an associated group excludes others left unmentioned. *Chevron U S.A. v. Echazabal,* 536 U S. 73, 80 (2002). The Senate Report identifies a list of "examples" of "internal personnel rules and practices of an agency" to include "personnel's use of parking facilities, or regulations of lunch hours, statements of policy as to sick leave, and the like." S. Rep. No. 89-813. If the Senate had intended "internal personnel rules and practices of an agency" to extend to documents wholly unrelated to routine employee relation matters, and include items such as manuals for investigators or examiners, it could have said so. The Senate's silence was far from quiet acceptance. Instead, as recognized in *Vaughn* and accepted by this Court, the House Report was a post hoc effort to change the meaning of the plain words of the statute.

The *Crooker* majority placed even greater significance on the belief that FOIA contained certain "cross-currents" where it mandated a broad policy of full disclosure, but acknowledged that "full disclosure must be tempered in order to protect 'the operation of our Government.' " 670 F.2d at 1058. This "cross-current" was derived from a single statement in the Senate Report:

> At the same time that a broad philosophy of "freedom of information" is enacted into law, ..(i)t is also necessary for the very operation of our Government to allow it to keep certain material, *such as the investigatory files of the Federal Bureau of Investigation*.

Id. (quoting S. Rep. No. 89-813 at 3.) (emphasis added). But this "cross-current" – the need to keep materials such as FBI investigative materials secret – was addressed in FOIA's original 1966 version of Exemption 7. The 1966 version of Exemption 7 exempted from disclosure "investigatory files compiled for law enforcement purposes except to the extent available by law to a private party." 5 U.S.C. § 552(b)(7) (1966). In other words, the "cross-current" identified by the *Crooker* majority was also recognized by Congress and subsequently addressed.

There was no need for the court to expand Exemption 2 based on a claimed "cross-current."

Crooker's "cross-current" and its implication that agencies and courts are free to expand the stated exemptions in order to support the "operation of government" is at significant odds with the overriding legislative history behind FOIA and this Court's recognition that FOIA strongly favors disclosure:

> (W)e have repeatedly stated that '(t)he policy of the Act requires that the disclosure requirements be construed broadly, the exemptions narrowly.' Thus, faced with a conflict in the legislative history, the recognized principal purpose of the FOIA requires us to choose that interpretation most favoring disclosure

Rose, 425 U S. at 366 (quoting *Vaughn*, 523 F 2d at 1142) (internal citations omitted)

The *Crooker* court turned next to testimony at congressional hearings in order to find support for a High 2 exemption This Court has repeatedly stated that where an ambiguity in the statutory text is sufficient to warrant turning to legislative history, "the authoritative source" lies in the Committee Reports. *Eldred v Ashcroft*, 537 U.S. 186, 209, fn. 16 (2003) The *Crooker* majority focused attention on a statement made by Congressman Moss during one House hearing that Exemption 2 was intended to cover documents such as "manuals of procedure" for bank examiners or guidelines for FBI agents. *Crooker*, 670 F.2d at 1059 Congressman Moss made that statement in response to a concern raised by an assistant attorney general, Mr Schlei, that Exemption 2 did not go far enough. The exchange between Congressman Moss and Mr Schlei is worth repeating, however, because it does not support the creation of High 2·

> Mr. Moss· What this was intended to cover was instances such as the manuals of procedure that are handed to an examiner – a bank examiner, or a savings and loan examiner, or the guidelines given to an FBI agent.
>
> Mr. Schlei: Ah! Then the word "personnel" should be stricken Because "personnel" I think connoted certainly to use the employee relations, employee management rules and practices of an agency. What you meant was materials related solely to the internal rules and practices of any agency for the guidance of its employees – something like that
>
> I do agree that there should be protection for the instructions given to

> FBI agents and bank examiners, people who, if they are going to operate in expectable ways, cannot do their jobs. Their instructions have to be withheld.
>
> But I think that word "personnel" does not do the job well enough, Mr. Chairman. I am sure it can be done.
>
> Mr Moss· We will hope to seek a way of doing the job without exempting internal rules and practices
>
> Mr. Schlei I suppose that would cover quite a lot of ground, Mr. Chairman
>
> Mr. Moss: Because I am afraid that we would there open the barn door to everything.
>
> Mr. Schlei: Well it is one of those things, Mr. Chairman, that just shows how hard it is to cover the whole Government with a few words. There are a number of problems.
>
> Mr. Moss· Oh, we recognize the difficulty and the complexity, but we are perfectly willing to work at it.

Crooker, 670 F 2d at 1059, fn 24 (quoting House Hearings on H R. 5012, at 29-30.)

Far from supporting the High 2 expansion, this exchange demonstrates the opposite – it demonstrates first that Congressman Moss recognized that leaving the word "personnel" out would "open the barn door" of the exemption. More importantly, it demonstrates that Congressman Moss recognized that the actual words of the statute did not cover investigative material and that additional "work" would be necessary. But no additional work was done. The House passed the Senate Bill without amendment The House's knowledge that Exemption 2 in the Senate Bill did not exempt manuals and guidelines, but failure to amend the language demonstrates acceptance of the Senate Report and a narrow reading.

Contrary to the D.C. Circuit's analysis in *Crooker*, now formally adopted by the Ninth Circuit, the Legislative History does not support the creation or expansion of High 2 By adopting a High 2 interpretation, the D C Circuit and Ninth Circuit have done precisely what Congressman Moss was concerned with – removed the term "personnel" from the statute and "open[ed] the barn door" to a broad use of Exemption 2 to cover both personnel and non-personnel matters of substantial public interest

4. The Policy Concerns that Informed *Crooker* Were Resolved by Congress in Its 1986 Amendment to Exemption 7.

Courts must be "wary against interpolating . . notions of policy in the interstices of legislative provisions." *Piper v. Chris-Craft Industries, Inc* , 430 U S. 1, 26 (1977) (quoting *Scripps-Howard Radio v. FCC*, 316 U.S. 4, 11 (1942)). The underlying issue at stake in *Crooker* was the court's concern over the release of the Bureau of Alcohol, Tobacco and Firearms' manual "Surveillance of Premises, Vehicles and Persons." *Crooker*, 670 F 2d at 1053 The D.C. Circuit was not alone in this concern other circuits that have adopted High 2 have done so initially in the context of a manual of investigative procedures for law enforcement. *See*, *e.g.*, *Caplan v Bureau of Alcohol, Tobacco & Firearms*, 587 F.2d 544 (2nd Cir. 1978) (request for ATF training manual on "Raids and Searches" withheld under Exemption 2); *Hardy v Bureau of Alcohol, Tobacco and Firearms,* 631 F.2d 653 (9th Cir 1980) (request for ATF training manual on "Raids and Searches" withheld under Exemption 2) Certainly, as a matter of policy it is no surprise that the ATF did not want the general public, including those regulated by the ATF, to know how the agency conducted surveillance operations Unfortunately, these training manuals were not "solely" or "merely" "internal personnel rules or practices." 5 U.S.C. § 552(b)(2) The manuals did not control how the

ATF dealt with its internal employees, but instead concerned how ATF personnel dealt with the regulated public. Under a plain language reading of Exemption 2, because these manuals were not "related solely to internal personnel rules and practices of the agency," they did not fall within FOIA's numerated narrow exemptions.

Perhaps, therefore, it is not a surprise that the D C. Circuit felt obligated to support the ATF's position and read a second level of exemption into the plain language of Exemption 2. While the outcome – protecting against the release of law enforcement training materials – may have been desirable, *Crooker* was, in fact, little more than judicial legislation.[8] As Justice Frankfurter explained:

> [T]he courts ... are under the constraints imposed by the judicial function in our democratic society. As a matter of verbal recognition certainly, no one will gainsay that the function in construing a statute is to ascertain the meaning of the words used by the

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[8] Indeed, as the dissent in *Crooker* pointed out, the *Crooker* plurality exceeded its bounds and crossed into judicial legislation by "attempt[ing] to perform the omitted legislative act and work out a compromise which it thinks years after the event might have been acceptable to both houses." 670 F 2d at 1093 (Wilkey, J., dissenting)

> legislature. To go beyond is to usurp a power which our democracy has lodged in its elected legislature... A judge must not rewrite a statute, neither to enlarge nor to contract it. Whatever temptations the statesmanship of policy-maker might wisely suggest, construction must eschew interpolation and evisceration.

Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 533 (1947) (quoted in, *FBI v. Abramson*, 456 U.S. at 633 (O'Connor, J , dissenting) But this is precisely what the *Crooker, Caplan* and *Hardy* courts did: the courts added terms to an express and unambiguous statute based on a belief that this is what Congress would have done if it had thought about it The plain and express language of Exemption 2 does not include the "High 2" exemption created by *Crooker* and now endorsed in *Milner*.

More importantly, the original policy concern driving the courts' creation of High 2 no longer exists In 1986 Congress expressly recognized the policy behind *Crooker*, and the need for an explicit exemption for law enforcement materials, the release of which might risk circumvention of law. Congress amended FOIA specifically codifying the *Crooker* holding into Section 7(E). 5 U.S C.

§ 552(b)(7)(E).[9] *See*, *Kaganove v. U.S. EPA*, 856 F.2d 884, 888-89 (7th Cir. 1988).

The Ninth Circuit found Congress's 1986 amendments "illustrative" as evidence that *Crooker* was an accurate statement of congressional intent. *Milner*, 575 F.3d at 966. To the contrary, while Congress accepted the outcome of *Crooker*, and recognized amendment was necessary, it amended only Exemption 7 – the law enforcement exemption.[10] The Senate originally proposed amendments to both Exemption 2 and Exemption 7. Citing *Crooker*, the Senate Report discussed amending Exemption 2 to add language specifically

> including such materials as (A) manuals and instructions to investigators, inspectors, auditors or negotiators, to the extent that disclosure of such manuals and

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[9] Exemption 7(E) provides that FOIA does not apply to matters that constitute "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information. (E) would disclose techniques and procedures for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law." 5 U.S.C. § 552(b)(7)(E).

[10] The 1986 FOIA Reform Act was enacted as part of the Anti-Drug Abuse Act of 1986. Pub. L. No. 99-570, 100 Stat. 3207. The only related and relevant committee report is that of the Senate Judiciary Committee from three years earlier reporting on a series of FOIA amendments the Senate passed in the 98th Congress. S. Rep. No. 98-221 (1983).

> instructions could reasonably be expected to jeopardize investigations, inspections, audits or negotiations, and (B) examination materials used solely to determine individual qualifications for employment, promotion or licensing to the extent that disclosure could reasonably be expected to compromise the objectivity or fairness of the examination process.

S. Rep. No. 98-221 at 20-21, 44-45 (1983) But the 1983 Senate Bill did not pass the House Instead, the 1983 Senate bill was re-introduced in 1986 and ultimately adopted by both Houses in the 1986 FOIA Reform Act Notably, the Senate's proposed amendment to Exemption 2 was not included in the 1986 FOIA Reform Act. Instead, Congress limited its *Crooker*-based amendments solely to expanding Exemption 7.[11] The expansion of Exemption 2, as proposed by the Senate in 1983, was not introduced in the 1986 amendments.[12] This legislative history does not support further expansion of Exemption 2 by the courts. To the contrary, when Congress deemed it necessary to amend FOIA in response to *Crooker* and *Jordan*, it specifically did not follow the courts' lead and amend Exemption 2. It amended only Exemption 7.

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[11] The 1983 Senate Report confirmed that the Senate was expanding Exemption 7 to address *Jordan* and *Crooker*. S Rep. 98-221 at 24-25 (1983). *See also* 132 Cong Rec. H9462-68 (daily ed. (Oct. 8, 1986)) (Kindness statement confirming amendments expand exemption 7(E) and 7(F))

[12] 132 Cong. Rec S13648, 13660-13661 (daily ed. (Sept 25, 1986))

Consequently, since Congress amended Exemption 7 to address the policy issues raised by *Crooker*, the judicially-created High 2 reading for Exemption 2 is no longer necessary.[13] Moreover, the High 2 reading of Exemption 2 is unnecessary to protect the interests of government, given the protections afforded by other exemptions. For example, other FOIA exemptions protect the national security interest tenuously asserted by the Navy here. Exemption 1 allows an agency to protect any document it believes will endanger our nation's defense by classifying it. 5 U.S.C. § 552(b)(1). Similarly, Exemption 3 protects documents that are exempt from disclosure by statute. 5 U.S.C. § 552(b)(3).

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[13] As Professors Davis and Pierce recognized in their 1994 Administrative Law Treatise:

> In the FOIA Reform Act of 1986, Congress eliminated the need for courts to choose between assisting criminals and distorting the meaning of the second exemption. It amended the seventh exemption to include "guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law.

Davis, K., Pierce, R., Administrative Law Treatise, § 5.8 (1994) (emphasis added).

B. Even If the Court Finds Room for a High 2 Exemption the Court Should Sharply Limit the Exemption

If the Court agrees that a narrow reading of the plain language of Exemption 2 does indeed allow for a second, "High 2," exemption, the Court should sharply limit the scope of the exemption so as to be consistent with its dictum in *Rose*.

First, the Court should limit the scope of High 2 to documents that are "related solely" to internal personnel rules and practices. *Supra* at 17-18. In this case, for example, while the ESQD maps and data are indeed used by agency personnel, they are not "related solely" to internal matters. Indeed, as Indian Island's Commander Whitbred fully agrees, "Explosive Quantity-Distance requirements and explosives standards are designed to provide the inhabitants of nearby communities, the personnel of Department of Defense shore activities and adjacent public and private property owners reasonable safety from serious injury or destruction from fires or explosions . . ." J. App. 58. The Navy has also recognized that explosions may expand beyond the boundaries of Indian Island, and that civilian emergency responders need to know how far a disaster might spread. As Commander Whitbred confirms: "[w]e sometimes share ESQD information with local municipalities, if the request supports a legitimate government purpose such as emergency response preparedness." J. App. 59. Indeed, "we have shared ESQD information with 'first responders' at both Jefferson County and the City of Port Townsend." *Id.* Thus, because the ESQD maps and data are certainly a matter of significant public interest, are provided to outside agencies, and describe events that will extend well beyond the boundaries of Indian Island should a disaster occur, they cannot, by definition, be "solely related to internal personnel" matters. The ESQD maps and data do not fit within even High 2 if High 2 exists.

Second, the Court should require agencies to demonstrate that release of the solely internal personnel materials will risk circumvention of an agency regulation by a person or entity subject to regulation by the agency in question. *Rose*, 425 U.S. at 364. In *Rose*, this Court recognized that previous courts had relied on the House Report and allowed agencies to withhold documents under Exemption 2:

> where necessary to prevent the circumvention of agency regulations that might result from disclosure *to the subjects of the regulation* of the procedural manuals and guidelines *used by the agency in discharging its regulatory function*.

425 U.S. at 364 (emphasis added). The Ninth Circuit's decision in *Milner*, however, goes far

beyond this Court's dicta and extends the High 2 exemption regardless of whether the agency conducts regulatory functions or whether the agency regulates individuals or entities other than its own employees. As discussed by Judge Fletcher's dissent below, courts since *Crooker* have steadily increased the applicability of High 2 to cover matters outside traditional law enforcement *See* 575 F.3d at 977-978 Examples range from withholding of "crediting plans" used to evaluate job candidates where the release would compromise the application process, *National Transportation Employees Union v. U S. Customs Service*, 802 F.2d 525, 529-531 (D.C. Cir. 1986), to withholding documents containing an agency's litigation strategies where release would compromise the agency's ability to defend itself, *Schiller v. NLRB*, 964 F.2d 1205, 1207-08 (D C. Cir. 1992). Each of these cases, however, address the situation raised in this Court's *Rose* dicta – where the release would risk circumvention by a "regulated" person or entity where the agency is serving a regulatory function.

In this case, however, while non-Navy citizens are certainly affected by the Navy's implementation of its ESQD maps, neither Glen Milner nor any other person or entity, other than Navy personnel, are "regulated" by the ESQD maps. Nor is the Navy acting as a regulatory or law enforcement agency while implementing the ESQD maps. *See*, *Milner*, 575 F 23d at 978 (Fletcher, J., dissenting). The Ninth Circuit has far expanded the High 2 exemption beyond that contemplated by this Court. If there is a High 2, it must be sharply limited

CONCLUSION

FOIA was enacted to promote full agency disclosure of information unless the information is specifically exempt under one of nine clearly delineated and narrow exemptions. Neither the plain language nor legislative history supports a High 2 reading and it should be eliminated The Court should confirm that FOIA Exemption 2 is limited solely to minor or routine internal employment matters of no public interest The Court should reverse the Ninth Circuit.

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RESPONDENT'S
BRIEF

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No. 09-1163

In the Supreme Court of the United States

GLEN SCOTT MILNER, PETITIONER

v.

DEPARTMENT OF THE NAVY

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

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35092

QUESTION PRESENTED

Whether Exemption 2 of the Freedom of Information Act, 5 U.S.C. 552(b)(2), exempts from mandatory disclosure technical explosive and ammunition safety maps and data used by Navy personnel for the safe handling and storage of ordnance at Naval Magazine Indian Island.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statutory provision involved 2
Statement 2
Summary of argument 13
Argument:
  Exemption 2 applies when the disclosure of matters directly related to an agency's internal instructions to its personnel would significantly risk circumvention of agency functions 17
  A. The text of Exemption 2 covers records concerning an agency's internal rules and practices for its personnel to follow in performing governmental functions 20
  B. FOIA's statutory history confirms the scope of Exemption 2 indicated by its text 22
  C. This Court's decision in *Rose* supports the conclusion that Exemption 2 applies where disclosure of internal rules and practices would circumvent agency regulation 27
  D. Exemption 2's drafting history demonstrates that Congress intended to exempt from disclosure internal records for the use of agency personnel when public disclosure would circumvent agency functions 30
  E. *Crooker* correctly construed Exemption 2 and Congress has since ratified *Crooker*'s interpretation of Exemption 2 40
  F. The ESQD information at issue in this case was properly withheld under Exemption 2 47

Table of Contents—Continued: Page

G. Petitioner advances an unduly narrow reading of Exemption 2 that does not account for the exemption's important function within FOIA 48
Conclusion 55
Appendix – Statutory provisions 1a

TABLE OF AUTHORITIES

Cases:

Abraham & Rose, P.L.C. v. *United States*, 138 F.3d 1075 (6th Cir. 1998) 19

Administrator, FAA v. *Robertson*, 422 U.S. 255 (1975) 31, 35

Audubon Soc'y v. *USFS.*, 104 F.3d 1201 (10th Cir. 1997) 19

Bragdon v. *Abbott*, 524 U.S. 624 (1998) 23

Cafeteria & Rest. Workers Union v. *McElroy*, 284 F.2d 173 (1960), aff'd, 367 U.S. 886 (1961) 24

Central Bank of Denver, N.A. v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994) 43

Chrysler Corp. v. *Brown*, 441 U.S. 281 (1979) 35

CIA v. *Sims*, 471 U.S. 159 (1985) 49, 52

Crooker v. *BATF*, 670 F.2d 1051 (D.C. Cir. 1981) .... *passim*

Department of Defense v. *FLRA*, 510 U.S. 487 (1994) ... 48

Department of Justice v. *Reporters Comm. For Freedom of Press*, 489 U.S. 749 (1989) 22, 48

Department of the Air Force v. *Rose*, 425 U.S. 352 (1974) .... *passim*

Cases—Continued: Page

Director, Office of Workers' Comp. Programs v. *Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122 (1995) 49

Dirksen v. *HHS*, 803 F.2d 1456 (9th Cir. 1986) 51

Elliott v. *Department of Agric.*, 518 F. Supp. 2d 217 (D.D.C. 2007), aff'd 596 F.3d 842 (D.C. Cir.), cert. denied, 130 S. Ct. 3430 (2010) 52

EPA v. *Mink*, 410 U.S. 73 (1973) 27, 28, 31, 50

FBI v. *Abramson*, 456 U.S. 615 (1982) 49, 52

FDA v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) 43

Federal Land Bank v. *Bismarck Lumber Co.*, 314 U.S. 95 (1941) 46

Federal Open Mkt. Comm. v. *Merrill*, 443 U.S. 340 (1979) 33

Foreman & Clark, Inc. v. *NLRB*, 215 F.2d 396 (9th Cir.), cert. denied, 348 U.S. 887 (1954) 25

Hardy v. *BATF*, 631 F.2d 653 (1980) 19

Institute for Policy Studies v. *Department of the Air Force*, 676 F. Supp. 3 (D.D.C. 1987) 51

Jerman v. *Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 130 S. Ct. 1605 (2010) 23

John Doe Agency v. *John Doe Corp.*, 493 U.S. 146 (1989) 16, 48, 49

Jordan v. *Department of Justice*, 591 F.2d 753 (D.C. Cir. 1978) 45

Judicial Watch, Inc. v. *Department of Commerce*, 337 F. Supp. 2d 146 (D.D.C. 2004) 51

Cases—Continued: Page

Kaganove v. *EPA*, 856 F.2d 884 (7th Cir. 1988), cert. denied, 488 U.S. 1011 (1989) 43

Lorillard v. *Pons*, 434 U.S. 575 (1978) 23

Massachusetts v. *EPA*, 549 U.S. 497 (2007) 43

NARA v. *Favish*, 541 U.S. 157 (2004) 48

NTEU v. *United States Customs Serv.*, 802 F.2d 525 (D.C. Cir. 1986) 18

P.C. Pfeiffer Co. v. *Ford*, 444 U.S. 69 (1979) 46

Renegotiation Bd. v. *Bannercraft Clothing Co.*, 415 U.S. 1 (1974) 22

Rodriguez v. *United States*, 480 U.S. 522 (1987) 49

Rose v. *Department of the Air Force*, 495 F.2d 261 (2d Cir. 1974), aff'd, 425 U.S. 352 (1976) 29, 30

Rowe v. *New Hampshire Motor Transp. Ass'n*, 552 U.S. 364 (2008) 23

Schreibman v. *Department of Commerce*, 785 F. Supp. 164 (D.D.C. 1991) 51

Stoneridge Inv. Partners, LLC v. *Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008) 43, 44

T.S.C. Motor Freight Lines, Inc. v. *United States*, 186 F. Supp. 777 (S.D. Tex. 1960), aff'd *sub nom. Herrin Transp. Co.* v. *United States*, 366 U.S. 419 (1961) 24

United States v. *Hayes*, 325 F.2d 307 (4th Cir. 1963) 24, 25

Vaughn v. *Rosen*, 523 F.2d 1136 (D.C. Cir. 1975) 27, 28

Voinche v. *FBI*, 940 F. Supp. 323 (D.D.C. 1996), aff'd, No. 96-5304, 1997 WL 411685 (D.C. Cir. June 19, 1997), cert. denied, 522 U.S. 950 (1997) 52

Case—Continued: Page

Weinberger v. *Catholic Action of Haw./Peace Educ. Project*, 454 U.S. 139 (1981) 49

Statutes and regulation:

Act of Sept. 6, 1966, Pub L. No. 89-554, 80 Stat. 381:
  § 1, 80 Stat. 378:
    80 Stat. 381-388 22
    80 Stat. 392-393 22
  § 7(a), 80 Stat. 631 22
  § 8, 80 Stat. 633 22
Act of June 5, 1967, Pub. L. No. 90-23, 81 Stat. 54:
  § 1, 81 Stat. 54 22
  § 3, 81 Stat. 56 22
Administrative Procedure Act, ch. 324, 60 Stat. 237 (5 U.S.C. 1001 *et seq.* (1964)) 22
    § 3, 60 Stat. 238 (5 U.S.C. 1002 (1964)) 14, 23
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Statutes and regulation—Continued: Page

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Miscellaneous—Continued:	Page
p. 13,655	37
p. 13,659	37
pp. 13,646-13,647	37
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p. 3502	45
p. 3521	44
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p. 26,111	44
p. 26,473	45
p. 27,189	44
p. 27,208	45
p. 27,251-27,252	45
pp. 29,619-29,620	44
p. 29,620	42
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p. 707	54
p. 709	54
pp. 720-721	54

Miscellaneous—Continued:	Page
p. 729	54
p. 731	54
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In the Supreme Court of the United States

No. 09-1163

GLEN SCOTT MILNER, PETITIONER

v.

DEPARTMENT OF THE NAVY

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 26-64) is reported at 575 F.3d 959. The opinion of the district court (Pet. App. 4-25) is not published in the *Federal Supplement* but is available at 2007 WL 3228049.

JURISDICTION

The judgment of the court of appeals was entered on August 5, 2009. A petition for rehearing was denied on December 22, 2009 (Pet. App. 65). The petition for a writ of certiorari was filed on March 22, 2009, and was granted on June 28, 2010. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Exemption 2 of the Freedom of Information Act (FOIA), 5 U.S.C. 552, exempts from mandatory disclosure under FOIA matters that are "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. 552(b)(2).

STATEMENT

1. Naval Magazine Indian Island (NMII) is situated on an island that is strategically located in Puget Sound near the towns of Port Hadlock and Port Townsend, Washington. Pet. App. 28; J.A. 71-72 (maps). NMII, which has been used as a military arsenal since before World War II, stores and tranships multiple types of weapons, weapons components, ammunition, and explosives in support of the Navy, United States Joint Forces, Allied forces, and civilian federal agencies, including the Department of Homeland Security. J.A. 54, 60-61. The Navy is responsible for all operations on NMII, including law enforcement, security, force protection, and explosives safety. J.A. 54. The Navy has also established a restricted area in the waters surrounding NMII's loading pier that excludes all civilian vessels "during periods when ship loading and/or pier operations preclude safe entry." 33 C.F.R. 334.1270(b); cf. J.A. 71 (map showing pier on northwest corner of NMII).

This case involves a FOIA dispute about site-specific and ordnance-specific information at NMII. By 1941, the Navy had promulgated internal explosive-safety regulations to govern the storage and movement of explosives and ammunition by personnel at Navy and Marine Corps installations worldwide. See J.A. 65; see also J.A. 16. Those regulations are currently contained within a document entitled Naval Sea Systems Command

(NAVSEA) OP 5, Volume 1, "Ammunition and Explosives Safety Ashore, Safety Regulations for Handling, Storing, Production, Renovation and Shipping" (OP-5). J.A. 14, 16, 64-65. The current version of OP-5 is the Seventh Revision, Change 8. Cf. J.A. 65.

The Navy uses the OP-5 to instruct its "personnel engaged in operations involving ammunition, explosives, and other hazardous materials" and to establish "standardized safety regulations for the production, renovation, care, handling, storage, preparation for shipment, and disposal of these items." J.A. 16. The ultimate purpose of the Navy's explosive-safety program is to protect human life and property from "the harm that could occur from an incident, accident[,] or breach of security." J.A. 58.

Among other things, OP-5 is used to govern Navy personnel in formulating construction plans associated with explosives-related facilities, which must undergo an elaborate review process before final approval. J.A. 59, 65; cf. J.A. 18-41 (portion of OP-5, Chapter 8).[1] The OP-5 specifies the effects of accidental and intentional detonations of ordnance through formulas and data, which reflect the "type and quantity of explosives material" involved and the "degree of protection needed" by considering, *inter alia*, "the vulnerability of various structures to blast and fragment damage." J.A. 59, 66; cf. J.A. 28-29. Among other things, the OP-5 contains sensitive data on the "distances that must be maintained between explosives concentrations, ships, or vehicles to prevent mass detonations." J.A. 66.

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[1] Petitioner purportedly purchased portions of the OP-5 over the internet, J.A. 9, and the Navy has referred the matter to appropriate authorities for investigation. J.A. 76. The portions of a former edition of OP-5 that petitioner has filed in the record (*e.g.*, J.A. 18-41) do not appear to contain highly sensitive technical data. Cf. *ibid.*

In light of the sensitive nature of the information in OP-5, the Navy restricts the document's distribution. The OP-5 states that its "[d]istribution [is] authorized to U.S. Government agencies and their contractors for administrative and operational use" and includes a "DESTRUCTION NOTICE" directing unauthorized recipients to "[d]estroy [the document] by any method that will prevent disclosure of [its] contents." J.A. 14, 55-56, 66-67. The OP-5 also prominently displays a "WARNING" that the document "contains data whose export is restricted by the Arms Export Control Act (Title 22, USC, Sec 2751 et seq.) or Executive Order" and that violations "are subject to severe criminal penalties." *Ibid.*; see J.A. 68-69.

Navy personnel at NMII require site-specific and ordnance-specific information to implement OP-5's general practices and procedures. Accordingly, NMII personnel utilize what is known as Explosive Safety Quantity Distance (ESQD) information based on the OP-5 to perform their duties under the Navy's explosives safety program. J.A. 58. ESQD information reflects the effects at varying distances of detonating a specific quantity and specific class of ordnance. *Ibid.* That information is then used to "define minimum separation distances for quantities of explosives based on required degrees of protection," *ibid.*, and thereby to determine the specific placement and utilization of magazines both to prevent "propagation of fires or explosions" between magazines and to minimize risks to human beings who may be located in nearby inhabited buildings or transportation routes. J.A. 36-37, 58-59. ESQD information specifying those distances may be graphically represented on maps as ESQD "arcs," with the center of an arc roughly representing the location of a potential detonation. J.A. 58.[2]

ESQD information developed specifically for NMII is used by Navy personnel to establish minimum separation distances for the various quantities and types of ordnance stored at and moved through the facility. J.A. 59. The information is thus utilized to perform the difficult task of "monitoring and protecting [the] explosives" at NMII, which are "in a constant state of flux," by guiding Navy personnel in "organiz[ing] ammunition operations" at NMII and "design[ing], array[ing], and construct[ing] ammunition storage facilities." J.A. 59, 61.

The Navy evaluates external requests for ESQD information on a case-by-case basis and does not release the information when it determines that the release might pose a serious threat of death or injury to any person. J.A. 59. In order to facilitate appropriate emergency preparedness, the Navy has occasionally shared sensitive ESQD information pertaining to NMII with local first responders. *Ibid.*[3]

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[2] Navy personnel use "multiple types of [ESQD] arcs" to specify the appropriate distances from an ordnance storage site (at the center of an arc) to different types of locations. J.A. 59. For instance, one arc for a specific quantity and type of ordnance will reflect the appropriate separation distance to a hardened, earth-covered magazine; a larger arc will specify the appropriate distance to a less hardened magazine or storage location; and a yet larger arc will define the appropriate distance to an inhabited building. Cf. J.A. 36-37; cf. also J.A. 33.

[3] ESQD information for NMII has been improperly released on a few occasions. In one instance, ESQD information was inadvertently disclosed when an internal government presentation was posted online in 2006. J.A. 80. In another instance, Navy personnel provided an ESQD arc map showing inhabited-building-distance arcs for NMII to local first responders for official use only. J.A. 83-84. The map (J.A. 52)

2. a. In 2003 and 2004, petitioner submitted two substantially identical FOIA requests to the Navy. Pet. App. 6 & n.1, 29 & n.1. Petitioner requested:

> 1. [A]ll documents on file regarding [ESQD] arcs or explosive handling zones at the ammunition depot at Indian Island. This would include all documents showing impacts or potential impacts of activities in the explosive handling zones to the ammunition depot and the surrounding areas;
>
> 2. [A]ll maps and diagrams of the ammunition depot at Indian Island which show ESQD arcs or explosive handling zones; and
>
> 3. [D]ocuments regarding any safety instructions or operating procedures for Navy or civilian maritime traffic within or near the explosive handling zones or ESQD arcs at the ammunition depot at Indian Island.

Id. at 29-30 (brackets in original).

The Navy identified a total of 17 document packages (totaling approximately 1000 pages) potentially responsive to petitioner's request. Most of the documents were ultimately released to petitioner, but 81 documents were withheld, in whole or in part, based on the Navy's conclusion that disclosure of the ESQD information could

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—which reflects two sets of arcs based on the actual net explosive weight (NEW) stored at NMII magazines on July 20, 2006, and the maximum approved NEW for the same magazines—appears to have been improperly provided to petitioner by a local official. J.A. 84; see J.A. 51. Although petitioner has stated that the chairman of the local board of commissioners did not himself give petitioner an ESQD arc map, J.A. 11, petitioner filed in this case a declaration from that official which included the map. See J.A. 51-52.

threaten the safety and security of NMII and the surrounding community. Pet. App. 30.

b. In 2006, petitioner filed this FOIA action in the Western District of Washington to compel the Navy to disclose the withheld ESQD information. J.A. 1; Pet. App. 30. The Navy moved for summary judgment, arguing, as relevant here, that the ESQD information at issue was protected from mandatory disclosure under FOIA Exemption 2, which exempts matters "related solely to the internal personnel rules and practices of an agency," 5 U.S.C. 552(b)(2). See Pet. App. 8, 30.[4]

The Navy submitted declarations by several Navy officials, including Commander George N.T. Whitbred IV, the commanding officer at NMII with 20 years of experience in explosives management and safety. J.A. 53-63. Commander Whitbred explained that NMII is part of the Navy's "worldwide ordnance logistics network" and must respond to operational demands with no local control "over the pace or extent of the movement" of munitions to and from the base. J.A. 62. The "constant flow of material onto the installation, from place to place within the installation and, finally, off the installation makes security a challenge." *Ibid.* He explained that ESQD arcs are created as part of the Navy's overall safety program for the storage and handling of explosives to ensure that NMII is "operated, to the utmost extent possible, as a safe and secure facility providing ordnance logistics to a wide array of military and federal entities." *Ibid.*; see J.A. 58-59.[5]

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[4] The Navy also argued that ESQD information was exempt from disclosure under Exemption 7(F), 5 U.S.C. 552(b)(7)(F), but neither the district court nor the court of appeals resolved that issue. Pet. App. 25, 46 n.8. But cf. *id.* at 47, 60-62 (W. Fletcher, J., dissenting) (rejecting Exemption 7(F)'s application by concluding that the records were not compiled for law-enforcement purposes).

NMII utilizes numerous magazines and other facilities scattered throughout the installation. Cf. J.A. 71 (map). Commander Whitbred explained that ammunition and explosives must be stored and handled so that a fire or explosion at one location will not lead to a "sympathetic detonation" or chain reaction at other sites with munitions. J.A. 61; see J.A. 37; Pet. App. 29. The Commander added that "a terrorist or other lawbreaker would employ this same concept (in reverse) to create maximum damage with minimum outlay of effort" with ESQD data from NMII. J.A. 61; see J.A. 57-58. "[A] lay person with a rudimentary knowledge of mathematics," he explained, "could easily determine" from NMII's site-specific ESQD information a wide range of information, including "the precise location of ordnance magazines"; the "types" and "quantities of materials stored" therein; the "locations to target for maximum damage to personnel, critical infrastructure and disruption of loading and off-loading of ships"; and "the mission capability of the installation," including its "battle group capability and operational sustainability." J.A. 57-58.

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[5] In response to petitioner's contention that some ESQD information from 1995 for the nearby Bangor submarine base was released in February 2001, Commander Whitbred explained that Bangor is a "single-weapon system facility" and that NMII's task of monitoring and protecting a changing mix of "multiple weapons, weapons components, ammunition and explosives" is "concomitantly more complex." J.A. 60-61. Although the Commander could not address what might have led to the release of the dated ESQD arcs from Bangor, he explained that NMII has a "completely different" mission, "security parameters, and physical characteristics"; that disclosures of such information are assessed "on a case-by-case basis"; and that the "current state of tensions" in a post-9/11 world counsel against releasing ESQD arcs. J.A. 59-60, 77. Petitioner does not contend that the same ESQD information is at issue in this case, and has not challenged the court of appeals' conclusion that any release from Bangor does not waive or otherwise affect the Navy's assertion of Exemption 2 here. See Pet. App. 45-46; cf. Pet. Br. 5.

The Commander concluded that, "based on my training and experience, I believe *strongly* that release of the sensitive ESQD information involved in this case would jeopardize the safety and security of the storage, transportation and loading of ammunitions and explosives" and "would create a serious threat to the base and its surrounding communities." J.A. 62; see Pet. App. 46.

3. The district court granted summary judgment to the Navy. Pet. App. 4-25. The district court concluded that the Ninth Circuit's Exemption 2 jurisprudence paralleled that of the D.C. Circuit and that, under the D.C. Circuit's en banc decision in *Crooker* v. *BATF*, 670 F.2d 1051 (1981), Exemption 2 applies where agency records are "predominantly internal" and their disclosure would "significantly risk circumvention of agency regulation." Pet. App. 19-20 (citation omitted).

Applying that test, the district court explained that "[petitioner] does not dispute that the ESQD arc information" at issue "was compiled for predominantly internal purposes: to design, array, and construct ammunition storage facilities, and to organize ammunition operations" at NMII. Pet. App. 21. The court also determined that public disclosure of such information "would significantly risk circumvention of law." *Ibid.* After noting that "[petitioner] does not offer any evidence truly disputing the Navy's risk assessment," the court concluded that public release of the disputed ESQD information not only "could cause the information to lose its utility in keeping people and property safe from harm," but also "could provide essentially a roadmap to wreak the most havoc possible to those persons bent on causing harm, risking circumvention of the Navy's security, force protection and explosives safety efforts." *Id.* at 23. The court explained that "releas[ing] this information would be to provide the proverbial fox a virtual map to the chicken coop," and that the information was therefore exempt from mandatory disclosure under Exemption 2. *Ibid.*

4. The court of appeals affirmed. Pet. App. 26-64.

a. The court of appeals explained that courts have concluded that two general categories of information are protected from disclosure under Exemption 2. First, so-called "Low 2" material includes "mundane employment matters" at an agency that "are not of 'genuine and significant public interest.'" Pet. App. 32 (quoting *Department of the Air Force* v. *Rose*, 425 U.S. 352, 363 (1976)). Second, so-called "High 2" records involve "more sensitive government information" that are exempt when they relate to "internal personnel rules and practices" the disclosure of which "may risk circumvention of agency regulation." *Ibid.* (quoting *Rose*, 425 U.S. at 369). The court of appeals explained that this case concerns High-2 material. The court expressly "endorse[d] the D.C. Circuit's [Exemption 2] analysis" in *Crooker*, and it therefore held that "Exemption 2 shields those personnel materials which are predominantly internal and disclosure of which would present a risk of circumvention of agency regulation." *Id.* at 32-34.

The court of appeals explained that the en banc D.C. Circuit's 1981 decision in *Crooker* provided an "extraordinarily comprehensive analysis of the statutory language, legislative history, and caselaw" and "has become the authoritative case" on Exemption 2. Pet. App. 39. At least four other courts of appeals, it explained, have adopted or relied upon *Crooker*, and its own formal adoption of the same test would create a more uniform standard for Exemption 2 nationwide. *Ibid.* The court added that "[t]he text and history of Exemption 2" show that Congress balanced two potentially competing interests—"'the right of the citizenry to know what the Government is doing, and the legitimate but limited need for secrecy to maintain effective operation of Government'"—and that Congress ultimately decided to exempt from mandatory disclosure "personnel matters that are predominantly internal" when "disclosure presents a risk of circumvention of agency regulation." *Id.* at 39-40 (quoting *Crooker*, 670 F.2d at 1062).

The court of appeals concluded that "the information sought here is predominately used for the internal purpose of instructing agency personnel on how to do their jobs" and therefore "fit[s] within the statutory language" of Exemption 2. Pet. App. 40-41. "The ESQD arcs at issue," the court explained, "are essentially an extension of the OP-5 manual, which governs operations at NMII," and therefore "constitute one part of the internal policies and procedures that NMII personnel are bound to follow when handling and storing explosive ordnance." *Id.* at 40. The court also concluded that the Navy need not "classify this information in order to keep it internal," recognizing that classification could present "logistical challenges" where, as here, the Navy has shared ESQD information with local first responders "whose fire, rescue, and police services would be needed in the event of an accident or attack on NMII." *Id.* at 41. Moreover, the court concluded that the Navy's "limited, confidential" distribution to first responders for those important "official purposes" maintained the predominantly internal character of the information and that such interagency cooperation "must be permitted." *Ibid.*

The court of appeals additionally concluded that publicly disclosing the ESQD information here would risk "circumvention of agency regulation." Pet. App. 42-46. It explained that the circumvention standard has not been limited to the circumvention of statutes that are enforced against private parties and, instead, applies when disclosure would render the requested documents "operationally useless." *Id.* at 43 (citation omitted). An agency invoking Exemption 2, the court emphasized, must provide "a detailed affidavit describing how disclosure would risk circumvention of agency regulation." *Id.* at 45 (citation omitted). In this case, "[t]he Navy has described in detailed affidavits precisely how public disclosure would risk circumvention of the law—the ESQD arcs sought here point out the best targets for those bent on wreaking havoc" and would "greatly aid[]" a "terrorist who wished to hit the most damaging target or a protestor who wished to disrupt the Navy's monitoring and transportation protocols." *Ibid.* In short, public disclosure of the ESQD records, which were created "to prevent catastrophic detonations," would "make catastrophe more likely" and would "quickly render those documents obsolete for the purpose for which they were designed." *Ibid.* (citation omitted).

b. Judge William Fletcher dissented. Pet. App. 47-64. Judge Fletcher agreed with the majority that "the reasoning of the D.C. Circuit articulated in *Crooker*" is correct and should be followed. *Id.* at 55. He also agreed that Exemption 2 covers records that are "'predominately internal' and pertain to 'personnel rules and practices of an agency.'" *Ibid.* But Judge Fletcher disagreed that the information here satisfied *Crooker*'s "circumvention requirement" because, in his view, that requirement applies only to circumvention "by a person or entity that is subject to regulation by the agency in question." *Ibid.* (citation omitted). Although Judge Fletcher did not take issue with the Navy's assessment of the "risk of harm from release of the [ESQD arc] maps," he concluded that Exemption 2 does not protect against such harms because "the risk is not that a regulated person or entity will be thereby assisted in avoiding the agency's regulation." *Id.* at 59-60.

SUMMARY OF ARGUMENT

The court of appeals correctly held that the ESQD information at issue in this case was protected from mandatory disclosure by FOIA Exemption 2, which protects matters "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. 552(b)(2). The court of appeals followed the en banc D.C. Circuit's pathmarking decision in *Crooker* v. *BATF*, 670 F.2d 1051, 1053, 1074 (1981), which held that Exemption 2 applies to materials concerning the "rules and practices governing agency personnel" in the discharge of their governmental duties if they are predominantly for internal agency use and disclosure would "significantly risk[] circumvention" of agency functions. That understanding correctly interprets Exemption 2's text in light of its statutory and drafting history, is consistent with this Court's decision in *Department of the Air Force* v. *Rose*, 425 U.S. 352 (1976), and has guided federal courts construing Exemption 2 for nearly thirty years. Indeed, Congress subsequently ratified *Crooker*'s rationale by codifying its test in a closely related FOIA Exemption.

1. Exemption 2's text demonstrates that the Exemption applies generally to matters concerning internal

rules and practices to guide agency personnel in performing their duties. The term "personnel" refers to the officials who conduct the business of a government agency, and "personnel rules and practices of an agency" refers to the rules and practices that govern such personnel in the discharge of agency functions. That language resulted from Congress's decision to expand the Exemption's text to all such rules and practices from simply "employment" rules and practices. The term "internal" in Exemption 2 makes clear that the relevant rules and practices for personnel are those that an agency normally would not properly disclose to the public at large in order to properly execute its functions. Moreover, Exemption 2 applies not only to such "rules and practices" but also to matters that "relate solely" to them. The latter text expands the scope of the Exemption to related matters that are also maintained as "internal" and directly relate to the rules and practices that govern federal personnel.

Congress adopted nearly all of Exemption 2's text from a predecessor exemption in the APA, which applied to matters that "relat[e] solely to the internal management of an agency." 5 U.S.C. 1002 (1964). The federal courts had repeatedly construed that exemption to cover matters affecting the public if agencies primarily used the information for internal purposes, such that the information was not needed by members of the public either to avail themselves of agency procedures or to guide their day-to-day affairs to comply with agency requirements. Congress recognized that the text of that predecessor provision had been broadly construed, and it adopted it nearly verbatim in FOIA. Congress thus explained that the Exemption was similar to its APA predecessor and that substituting "personnel rules and practices" for "management" would simply make the Exemption "more tightly drawn." See *Rose*, 425 U.S. at 362 (citation omitted).

2. Were this Court to interpret Exemption 2 on a clean slate, it could properly conclude, based on the plain text of the Exemption alone, that the Exemption is broad and protects all matters directly related to an agency's internal rules and practices for guiding its personnel in the discharge of their duties. The Court's 1976 decision in *Rose*, however, followed a different interpretive approach that turned principally on the Court's evaluation of the legislative history of FOIA and, in particular, the balance that Congress struck between public disclosure and the need to maintain the confidentiality of records when disclosure would risk significant harm to governmental interests. That approach has guided federal courts in construing Exemption 2 for nearly 35 years and need not be altered now.

Exemption 2's drafting history confirms that Congress intended the Exemption to apply where the disclosure of internal rules and practices for agency personnel would risk circumvention of the very agency functions to which those internal rules and practices relate. That common-sense understanding is reflected in hearings, the committee report, and the debate in the House of Representatives, which made clear—with no articulated dissent whatsoever—that Exemption 2 would prevent such circumvention. Although petitioner relies on a Senate Report to support his reading, that Report does not itself purport to articulate an exhaustive understanding of Exemption 2 and does not contradict the earlier understanding in the House of Representatives that Exemption 2 protects against disclosures that significantly risk circumvention of important agency functions.

3. *Crooker* correctly interpreted Exemption 2 to prevent such circumvention, and Congress in 1986 ratified *Crooker*'s rationale in a closely related exemption. Congress amended Exemption 7(E) by expressly extending *Crooker*'s circumvention-of-law rationale to "guidelines for law enforcement investigations and prosecutions" when disclosure would "risk circumvention of the law." See 5 U.S.C. 552(b)(7)(E). Where, as here, Congress amends one part (Exemption 7(E)) of a balanced and integrated set of statutory provisions in light of its understanding of how another pre-existing part (Exemption 2) functions, Congress properly is understood to endorse both the newly enacted provision and the complementary understanding of the pre-existing provision.

4. Petitioner would have this Court dramatically change the law that has guided the courts for nearly 30 years. No court of appeals holding has rejected *Crooker*, and not even the dissenting judge below accepted petitioner's invitation to depart from *Crooker*'s understanding of Exemption 2. This Court should likewise decline petitioner's request to radically alter the Exemption's longstanding, practical scope.

Petitioner fails to account for the Exemption's important function within FOIA's carefully balanced statutory regime. Petitioner, for instance, relies on the assertion that FOIA's exemptions should be narrowly construed. But this "Court consistently has taken a practical approach" in interpreting FOIA's exemptions, in order to strike a "workable balance" between the public's general interest in disclosure and "the needs of Government to protect certain kinds of information from disclosure." *John Doe Agency* v. *John Doe Corp.*, 493 U.S. 146, 157 (1989). This Court has repeatedly made clear that Congress took a balanced, practical approach to disclosure in FOIA that is fundamentally inconsistent with petitioner's disclosure-at-all-cost approach. Each of FOIA's nine exemptions plays a significant and substantive role in protecting against common-sense harms that may flow from public disclosure. Exemption 2 is no exception.

Indeed, this case illustrates that important role that Exemption 2 plays within FOIA. The ESQD information at issue is used internally to guide Navy personnel in the discharge of their ordnance-related duties and thereby to ensure the safe handling of explosives material. Publicly releasing that information would enable individuals to discover numerous matters, including the location, type, and quantity of explosives in NMII's magazines. The Navy's commander for that facility has made clear that disclosure "would jeopardize the safety and security of the storage, transportation and loading of ammunitions and explosives." J.A. 62. Where, as here, disclosure of an agency's internal personnel rules and practices would significantly risk the circumvention of the agency's successful discharge of its lawful functions, Exemption 2 protects those records from public disclosure.

ARGUMENT

EXEMPTION 2 APPLIES WHEN THE DISCLOSURE OF MATTERS DIRECTLY RELATED TO AN AGENCY'S INTERNAL INSTRUCTIONS TO ITS PERSONNEL WOULD SIGNIFICANTLY RISK CIRCUMVENTION OF AGENCY FUNCTIONS

Exemption 2 of FOIA protects from mandatory disclosure matters that are "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. 552(b)(2). This Court has concluded that the Exemption applies at least in part to "'trivial matters'" in which "the public could not reasonably be expected to have an interest." *Department of the Air Force* v. *Rose*, 425 U.S. 352, 365, 369-370 (1976) (citation omitted). But, when records concern matters that are the subject of a "genuine and significant public interest," the Exemption does not apply, so long as public disclosure would not "risk circumvention of agency regulation." *Id.* at 369. *Rose* noted that Exemption 2 might protect records when their release could risk such circumvention, but concluded that it "need not consider" that question to resolve the case. *Id.* at 364, 369.

Five years later, the en banc D.C. Circuit issued its pathmarking decision in *Crooker* v. *BATF*, 670 F.2d 1051 (1981). After a thorough examination of FOIA's text and drafting history, *Crooker* held that Exemption 2 covers predominantly internal "rules and practices governing agency personnel" if their disclosure "significantly risks circumvention" of federal agency functions. *Id.* at 1053, 1056, 1074; see also *id.* at 1090 (R.B. Ginsburg, J., concurring) (concluding that the court's "plausible interpretation of the language of Exemption 2" is consistent with FOIA's "overall design," its legislative history, *Rose*, other courts, "and even common sense." (citation omitted)). That test is satisfied, for instance, when the disclosure of internal agency records would threaten to render them "obsolete for the purpose for which they were designed." *NTEU* v. *United States Customs Serv.*, 802 F.2d 525, 530 (D.C. Cir. 1986).

Petitioner requests that this Court reject the analysis of Exemption 2 that has consistently guided the federal courts and federal agencies since *Crooker*.[6] The Court should not do so: The court of appeals in this case correctly followed *Crooker* and properly concluded that Exemption 2 applies to the Navy's ESQD maps and data for NMII. FOIA's text indicates that Exemption 2 applies to records directly related to internal rules and practices to guide agency personnel in the discharge of governmental functions. FOIA's drafting and legislative history likewise confirm that *Crooker*'s focus on the risk of circumvention identifies the policy animating Exemption 2's application to internal agency records that deal with non-trivial subjects. *Rose* itself supports the conclusion that *Crooker*'s understanding of Exemption 2 comports with the carefully balanced scheme that Congress established in FOIA. Petitioner's reading of the Exemption, by contrast, would leave a significant hole in Congress's carefully calibrated statutory framework and substantially harm the government's ability to discharge important functions effectively.

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[6] Petitioner has not identified any holding by any court of appeals rejecting *Crooker*. See, *e.g.*, *Abraham & Rose, P.L.C.* v. *United States*, 138 F.3d 1075, 1080 (6th Cir. 1998) (finding *Crooker*'s textual analysis "sound and persuasive" and concluding in the Low-2 context that protected records must "relat[e] predominantly to an agency's internal 'rules and practices' for personnel"); *Audubon Soc'y* v. *USFS*, 104 F.3d 1201, 1204 & n.1 (10th Cir. 1997) (recognizing that several courts of appeals follow *Crooker*'s High-2 test, but finding that disputed records would not satisfy that test "even if we were to adopt [*Crooker*'s] analysis"). And although courts of appeals before *Crooker* employed varying rationales, they consistently concluded that FOIA does not require disclosures risking circumvention of agency functions. See *Hardy* v. *BATF*, 631 F.2d 653, 656 (9th Cir. 1980) (discussing cases).

A. The Text Of Exemption 2 Covers Records Concerning An Agency's Internal Rules And Practices For Its Personnel To Follow In Performing Governmental Functions

Exemption 2 applies to matters that are "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. 552(b)(2). The three central textual components of the Exemption—"personnel rules and practices," "internal," and "related solely"—demonstrate that Exemption 2 by its terms encompasses records concerning an agency's internal rules and practices for its personnel to follow in the discharge of their governmental functions.

First, the term "personnel" normally refers to either "a body of persons employed in some service" or "persons of a particular (as professional or occupational) group." *Webster's Third New International Dictionary* 1687 (1961) (*Webster's*); see *Random House Dictionary* 1075 (1966) ("the body of persons employed in any work, undertaking, or service"). In governmental contexts, the term normally refers to the officials who conduct the business of a government agency. See, *e.g.*, S. Rep. No. 813, 89th Cong., 1st Sess. 3, 8 (1965) (*1965 Senate Report*) (explaining that "definitive guidelines" should govern actions by "agency personnel" and discussing judicial remedies for wrongful FOIA withholding by "agency personnel"). When used in conjunction with "rules and practices" and the limiting phrase "of an agency," the phrase "personnel rules and practices of an agency" is logically understood to mean an agency's rules and practices for its personnel. See *Crooker*, 670 F.2d at 1056; cf. *Webster's* 1687 (defining "personnel carrier" as a "vehicle for transporting military personnel"). Such rules and practices provide instructions to guide the manner in which agency personnel discharge their official duties and perform governmental functions.

Second, the term "internal" reflects that the personnel rules and practices covered by Exemption 2 are those that are disseminated and used within the agency, rather than for external consumption or guidance. "Internal" typically means "existing or situated within the limits * * * of something," and carries a meaning that is "opposed to external." *Webster's* 1180 (emphasis omitted); see *Random House Dictionary* 743. An agency's "internal" rules and practices for its personnel accordingly refers to those rules and practices concerning the performance of agency functions that are normally kept within the agency itself and not disclosed externally.

Finally, the Exemption's application to matters that are "related solely" to an agency's internal rules and practices for its personnel extends beyond just the rules and practices themselves to matters that are "associated" with or "connected" to them. See *Random House Dictionary* 1211 (defining "related"); see also *Webster's* 1916. The term "solely" emphasizes that the relationship of such matters to an agency's internal personnel rules and practices must be direct. See *id.* at 2168 (defining "solely" to mean "to the exclusion of alternate or competing things"). Thus, those related matters, like the rules and practices themselves, must also be maintained for an agency's internal use.

The text of Exemption 2 accordingly captures matters that are maintained by an agency for the internal use of its personnel, so long as those matters are directly related to internal rules and practices that an agency establishes to guide its personnel in the performance of various agency functions. Most agency functions can, of course, affect the public, and Exemption 2 by its terms is not limited to those matters concerning rules and practices that have no impact on the public at large. Instead, its focus is on the agency's need to confine the material to internal use for the purpose of instructing its personnel in the successful execution of governmental functions.

B. FOIA's Statutory History Confirms The Scope Of Exemption 2 Indicated By Its Text

Exemption 2's statutory history confirms the that reading of its text. Congress did not draft Exemption 2 on a clean slate. Rather, it enacted FOIA in 1966 as an amendment to Section 3 of the Administrative Procedure Act (APA), ch. 324, § 3, 60 Stat. 238 (5 U.S.C. 1002 (1964)). See FOIA, Pub. L. No. 89-487, 80 Stat. 250 (amending APA § 3); see also *Department of Justice* v. *Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 754 (1989); *Renegotiation Bd.* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 12 (1974).[7] Section 3 had previously required that agencies publish or make publicly available certain agency records, but expressly exempted from those requirements matters "relating solely to the internal management of an agency." 5 U.S.C. 1002 (1964). Congress recognized that "[t]he sweep of that wording" had led to the withholding of a wide range of agency records. *Rose*, 425 U.S. at 362. It nevertheless modeled Exemption 2 directly on that broad text, copying the exemption nearly verbatim while substituting the phrase "personnel rules and practices" for the term "management." See *id.* at 362-363.

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[7] When Congress enacted FOIA in July 1966, the APA was codified at 5 U.S.C. 1001 *et seq.* (1964). Two months later, Congress completed the revision and recodification of Title 5 by reenacting it as positive law. The recodification repealed the APA, ch. 324, 60 Stat. 237, and reenacted the APA's provisions without substantive change at their current location in 5 U.S.C. 551 *et seq.* and 701 *et seq.* But Congress did so without including FOIA's then-recent amendments or any other statute enacted after June 1965. See Act of Sept. 6, 1966, Pub. L. No. 89-554, §§ 1, 7(a), 8, 80 Stat. 381-388, 392-393, 631, 633. Congress therefore repealed FOIA in 1967 and simultaneously codified its provisions as positive law at 5 U.S.C. 552. See Act of June 5, 1967, Pub. L. No. 90-23, §§ 1, 3, 81 Stat. 54-56.

Where "judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, [Congress's] intent to incorporate * * * [those] judicial interpretations." *Bragdon* v. *Abbott*, 524 U.S. 624, 645 (1998) (citing *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978)); accord *Rowe* v. *New Hampshire Motor Transp. Ass'n*, 552 U.S. 364, 370 (2008); see *Jerman* v. *Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 130 S. Ct. 1605, 1616 (2010). That principle applies with particular force here, because courts had broadly construed the text of Exemption 2's direct predecessor and Congress was aware of that construction and chose to employ much of the same text in FOIA.

When Congress enacted FOIA, courts had already construed the APA's exemption for matters "relating solely to the internal management of an agency," 5 U.S.C. 1002 (1964), as covering matters pertaining to an agency's internal management functions, even when those functions affected members of the public. The relevant test for whether matters "relat[ed] solely" to the agency's "internal" management was whether public disclosure was necessary to "inform [private] parties of the procedure which is to be taken" in an agency, or otherwise to "affect[] any steps which interested parties must take or not take" to secure agency action or comply with agency requirements. See *T.S.C. Motor Freight Lines, Inc.* v. *United States*, 186 F. Supp. 777, 786 (S.D. Tex. 1960) (three-judge court), aff'd *sub nom. Herrin Transp. Co.* v. *United States*, 366 U.S. 419 (1961) (per curiam). Unless "knowledge of [the matter was] needed to keep the outside interests informed of the agency's requirements * * * as a guide in the conduct of *their* day-to-day affairs, and to instruct them in regard to the presentation to the agency of any such subject for impartial consideration or action thereon," the matter was understood to "relate[] solely" to the agency's own "internal" management functions. See *United States* v. *Hayes*, 325 F.2d 307, 309 (4th Cir. 1963) (per curiam) (emphasis added).

The en banc D.C. Circuit, for instance, addressed the scope of the APA exemption when an individual who was employed at a privately operated cafeteria within a "naval ordnance" facility challenged regulations that authorized the facility's commander to rescind the identification badge she needed for access to the facility and her job. *Cafeteria & Rest. Workers Union* v. *McElroy*, 284 F.2d 173, 175, 178 & n.11 (1960), aff'd, 367 U.S. 886 (1961). As relevant here, the court concluded that the regulations "relat[ed] solely to the internal management of an agency," even though they affected private parties, because such information concerning "naval operations" could not be deemed "public property" of the sort that the APA was intended to disclose. *Id.* at 179. Other courts similarly concluded that the designation of an official to certify agency records for external use against a private litigant related solely to "internal management," *Hayes*, 325 F.2d at 309, and that an agency's "methods of procedure" for issuing orders were exempt because they were not matters to which affected parties were required to "resort" in their dealings with the agency, *Foreman & Clark, Inc.* v. *NLRB*, 215 F.2d 396, 403 & nn.4-5, 410 (9th Cir.), cert. denied, 348 U.S. 887 (1954).

As the Fourth Circuit explained in *Hayes*, the fact that an official action will be "used outside of the [agency]" did "not change its character" as being related solely to internal agency management. 325 F.2d at 309. "Almost every act in the functioning of a Government agency will ultimately be felt beyond its precincts," the court reasoned, and "[i]f this possible touch with the outside removes such part of the agency's work from the category of 'internal management,' then the statutory exception would be meaningless." *Ibid.*[8]

The import of those decisions concerning "[t]he sweep of that wording" in the APA's pre-FOIA exemption, *Rose*, 425 U.S. 362, was clear to the Congress that enacted FOIA. The House Report accompanying FOIA, for instance, concluded that the phrase "relat[ing] 'solely to the internal management of the agency'" was "broad" and authorized the withholding of records "rang[ing] from the important to the insignificant." H.R. Rep. No. 1497, 89th Cong., 2d Sess. 5 (1966) (*1966*

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[8] The Attorney General's Manual on the APA did not attempt to specify the precise scope of Section 3's internal-management exemption. It noted that where "a matter is solely the concern of the agency proper, and therefore does not affect the members of the public to any extent, there is no requirement for publication under section 3." Department of Justice, *Attorney General's Manual on the Administrative Procedure Act* 18 (1947). But beyond that, the manual suggested that agencies err on the side of publication when in "doubt" as to whether the exemption applied. *Ibid.*; cf. *id.* at 44 (concluding that the phrase "rest solely" in another APA provision means rest "mainly"). The scope of Section 3's internal-management exemption was therefore subsequently defined in the cases discussed above.

House Report). The floor debate on the bill likewise acknowledged that the APA's predecessor exemption imposed no "reasonable limitations" on agency withholding. 112 Cong. Rec. 13,644-13,645 (1966) (statement of Rep. King).[9] And although Congress was "dissatisf[ied]" with the "sweep" of that exemption, it chose not to abandon the exemption wholesale. See *Rose*, 425 U.S. at 362 ("The phrasing of Exemption 2 is traceable" to its predecessor exemption). Congress simply replaced the term "management" with "personnel rules and practices" and described that substitute text as providing "'more tightly drawn' exempting language." *Ibid.* (quoting S. Rep. No. 1219, 88th Cong., 2d Sess. 12 (1964) (*1964 Senate Report*)).

Congress therefore maintained the broad understanding of the APA's predecessor text for matters that "relate solely" to "internal" agency operations but narrowed those operations from any form of agency "management" to those involving the agency's internal "personnel rules and practices." That change gave the exemption "a narrower reach," *Rose*, 425 U.S. at 363, but, as explained above, its application to internal "personnel rules and practices" meant that Exemption 2 would continue to apply to a significant category of records directly related to an agency's internal instructions to its personnel.

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[9] Representative Moss, who played a leading role in enacting FOIA and chaired the House subcommittee that held extensive hearings, explained that "the phrase 'internal management' is capable of being—*and has been*—construed to cover the withholding of everything" not already captured by other APA exemptions. John E. Moss, *Public Information Policies, the APA, and Executive Privilege*, 15 Admin. L. Rev. 111, 113 (1963) (emphasis added). That text, he added, had even been read to encompass an agency's "budget" plans for "spending taxpayers' money," which was "properly the concern of the citizen" and should be disclosed. *Ibid.*

C. This Court's Decision in *Rose* Supports The Conclusion That Exemption 2 Applies Where Disclosure Of Internal Rules And Practices Would Circumvent Agency Regulation

If this Court were to construe Exemption 2 on a clean slate, it could properly conclude based on the text of Exemption 2 alone that it protects from disclosure all matters directly related to an agency's internal rules and practices for guiding its personnel in the discharge of their governmental functions. The ESQD information at issue in this case would fall squarely within Exemption 2 as so construed. This Court's 1976 decision in *Rose*, however, followed a different interpretive approach to Exemption 2 that turned principally on the Court's evaluation of FOIA's legislative history, reflecting the competing values that Congress sought to balance in FOIA's exemptions and, in particular, in Exemption 2. See 425 U.S. at 362; *id.* at 360-369. That approach to Exemption 2 has guided the lower courts for nearly 35 years and need not be altered now.

Rose reasoned that the "clear legislative intent" underlying FOIA is "to assure public access to all governmental records whose disclosure would not significantly harm specific governmental interests." 425 U.S. at 365 (quoting *Vaughn* v. *Rosen*, 523 F.2d 1136, 1142 (D.C. Cir. 1975)). The Court recognized that, on the one hand, Congress sought to promote greater public access to agency records and, on the other, specified in exemptions the "types of information" that Congress determined "the Executive Branch must have the option to keep confidential." *Id.* at 361 (quoting *EPA* v. *Mink*, 410 U.S. 73, 80 (1973)). *Rose* accordingly emphasized that Congress designed FOIA to promote the "fullest *responsible* disclosure" by creating "a workable formula" that "balances[ ] and protects all [such] interests" though FOIA's exemption regime. *Id.* at 361-362 (quoting *Mink*, *supra*, which quotes *1965 Senate Report* 3) (emphasis added). The Court construed Exemption 2 in that light.

After concluding that Exemption 2's drafting history showed that Congress intended to give it a "narrower reach" than its similarly worded APA predecessor, *Rose*, 425 U.S. at 362-363, the Court turned directly to the House and Senate Reports addressing Exemption 2. *Id.* at 363. The Court ultimately concluded that it would "rely upon the Senate report" in circumstances where, as in *Rose*, disclosure would not risk "circumvent[ion]" of "agency regulation." *Id.* at 367.

In that context, where no significant governmental interest counseled against disclosure, the Court agreed with the D.C. Circuit's conclusion in *Vaughn* that the Senate Report's non-exhaustive list of "[e]xamples" that "may be" covered by the Exemption, 425 U.S. at 363 (quoting *1965 Senate Report* 8), suggests that "the line sought to be drawn" was between the types of "trivial matters" listed as examples—*i.e.*, rules concerning parking, lunch hours, and sick leave—and "more substantial matters which might be the subject of legitimate public interest." *Id.* at 365 (quoting *Vaughn*, 523 F.2d at 1142). In other words, the Court read the Senate Report to indicate that Exemption 2 strikes the balance in favor of disclosure when there is a significant public interest in the matter and no countervailing interest favoring withholding. It similarly agreed with *Vaughn*'s conclusion that because "disclosure would not significantly harm specific governmental interests" in that context, any conflict "in the legislative history" should be resolved as "favoring disclosure." *Id.* at 365-366 (quoting *Vaughn*).

The Court, however, was careful to explain that it agreed with the Second Circuit that it was "unnecessary to take 'a firm stand on'" whether the Senate or House Report was a more reliable indication of congressional intent generally or in other contexts. *Rose*, 425 U.S. at 367 (quoting *Rose* v. *Department of the Air Force*, 495 F.2d 261, 265 (2d Cir. 1974)). It reasoned that the "primary concern" reflected in the House Report was that Exemption 2 should operate to "prevent the circumvention of agency regulations" that could result from publicly disclosing "the procedural manuals and guidelines used by the agency in discharging its regulatory function." *Id.* at 364. The House Report therefore addressed contexts in which there was a risk of circumvention on the other side of the FOIA balance. Because *Rose* did not involve any such risk, the Court concluded that it "need not consider" whether "Exemption 2 [would apply] in such circumstances." *Ibid.*; see also *id.* at 366-367.

As a result, the Court agreed with the Second Circuit's "conclu[sion] that under 'the Senate construction of Exemption Two, the [Air Force Academy disciplinary] case summaries [at issue in *Rose*] clearly fall outside its ambit' because 'such summaries have a substantial potential for public interest outside the Government.'" 425 U.S. at 367 (quoting 495 F.2d at 265) (ellipsis and brackets omitted). The Court further agreed that—"at least where the situation is not one where disclosure may risk circumvention of agency regulation"—the public interest factor "'differentiates the summaries from matters of daily routine like working hours, which, in the words of Exemption Two, do relate "*solely* to the internal personnel rules and practices of an agency."'" *Id.* at 369 (quoting 425 F.2d at 265) (brackets omitted; emphasis in court of appeals' opinion).

The Court's interpretive approach in *Rose* reflected FOIA's fundamental balance between the public's interest in disclosure and countervailing interests in avoiding meaningful harm to governmental functions, and the Court's evaluation of the legislative history was informed by that balance. The Senate Report lists illustrative contexts in which no harm from disclosure would result, whereas the House Report addresses contexts in which both sides of the balance are in play. This case concerns the latter and, following this Court's lead in *Rose*, we turn to the relevant legislative history.

D. Exemption 2's Drafting History Demonstrates That Congress Intended To Exempt From Disclosure Internal Records For The Use Of Agency Personnel When Public Disclosure Would Circumvent Agency Functions

Exemption 2's drafting history offers three key lessons. First, Congress considered but rejected a narrower exemption targeting "internal *employment* rules and practices." That considered rejection significantly undermines petitioner's central premise in this case: that the Exemption applies only to the internal "employee relations matters" of an agency (Pet. Br. 12). Second, the legislative history shows that consideration of the Exemption in the House of Representatives repeatedly emphasized—in hearings, the committee report, and the floor debate—that Exemption 2 applies when disclosure would risk circumvention of the very agency functions to which the records relate. Those descriptions were never contradicted, and petitioner identifies nothing that detracts from that uniform understanding. Finally, the only specific description of Exemption 2 in the Senate was a carefully worded sentence in a report that did not even purport to provide an exhaustive description of the Exemption. That report tentatively stated that "[e]xamples" of internal personnel rules and practices protected by the Exemption "may be" matters such as rules regulating employee parking, lunch hours, and sick leave. *1965 Senate Report* 8. Nothing in that description contradicts the otherwise uniform understanding that Exemption 2 applies when disclosure would risk circumvention of the very governmental function addressed in the responsive agency records.

1. "[T]he principal source for the bill ultimately enacted as the Freedom of Information Act" was S. 1666, which Senator Long introduced in the 88th Congress. *Rose*, 425 U.S. at 375 n.14; see *1965 Senate Report* 4; 109 Cong. Rec. 9946 (1963). The drafting history of S. 1666, which developed the language Congress enacted as Exemption 2, demonstrates that Congress specifically considered and rejected a proposal to limit the Exemption to employment-related matters and, instead, adopted language that more broadly exempts internal agency rules and practices governing the conduct of agency personnel.[10]

As introduced, S. 1666 proposed narrowing the existing internal-management exemption from the APA's public-access requirement by limiting it to matters that

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[10] This Court has repeatedly looked to the legislative history surrounding S. 1666 to construe FOIA's text. See, *e.g.*, *Rose*, 425 U.S. at 362-363, 375 n.14; *Administrator, FAA* v. *Robertson*, 422 U.S. 255, 264 & n.8 (1975); *Bannercraft Clothing Co.*, 415 U.S. at 18 n.18; *Mink*, 410 U.S. at 90 n.17.

"relate[] solely to the internal employment rules and practices of any agency." 109 Cong. Rec. at 9962; S. 1666, 88th Cong., 1st Sess. 3 (1963) (§ 3(b)(3)). That restriction prompted opposition from the Executive Branch, which explained that protecting only "internal *employment* rules and practices" would injure important government functions. Norbert Schlei, the Assistant Attorney General for the Office of Legal Counsel, testified that the proposed change would not, outside the specific context of "employment rules and practices," permit the government to withhold internal "instructions to agency personnel as to how to operate" or what "techniques to use" in performing their duties. *Freedom of Information: Hearings on S. 1666 Before the Subcomm. on Admin. Practice and Procedure of the Senate Judiciary Comm.*, 88th Cong., 1st Sess. 201-202 (1963) (*1963 Senate Hearings*). The Assistant Attorney General explained that disclosing an agency's "internal agency instructions to its staff" would, for instance, risk "render[ing] the investigation function useless" by revealing the "agency's instructions to its investigators as to the means to be employed to detect violations." *Id.* at 201.

Senator Long, who chaired the subcommittee that held hearings on S. 1666, had made clear in those hearings that "[t]he committee, * * * and the Congress, wouldn't want to do anything that would seriously hurt the law-enforcement provision of any agency." *1963 Senate Hearings* 166. Consistent with that assurance, the Senate Judiciary Committee reported S. 1666 with an amendment that expanded Exemption 2 by deleting the phrase "internal employment rules and practices" and replacing it with "internal personnel rules and practices." 110 Cong. Rec. 17,086 (1964); see *1964 Senate*

Report 2 (amendment). That revised Exemption, the committee explained, was "similar" to the APA's existing exemption for internal management rules and practices, "but more tightly drawn." *Id.* at 12; see *Rose*, 425 U.S. 362.

The Senate subsequently adopted that amendment and passed S. 1666. See 110 Cong. Rec. at 17,086-17,089, 17,666-17,668. The bill was then referred to the House Judiciary Committee, *id.* at 17,852, which was considering a parallel bill that (like the original version of S. 1666) would have limited Exemption 2 to matters "relate[d] solely to the internal employment rules and practices of any agency." H.R. 8046, 88th Cong., 1st Sess. 3 (1963) (§ 3(b)(3)); see 109 Cong. Rec. at 15,044 (bill introduced by Rep. Fascell). The House of Representatives, however, was unable to pass S. 1666 before the end of the 88th Congress because the bill "reached [it] too late for action." *Rose*, 425 U.S. at 362-363.

2. "Substantially the same measure was reintroduced in the 89th Congress as S. 1160 and H.R. 5012." *Federal Open Mkt. Comm.* v. *Merrill*, 443 U.S. 340, 357 n.20 (1979). Senator Long and Representative Moss simultaneously introduced those bills on February 17, 1965. 111 Cong. Rec. 2780, 2946 (1965). Senator Long explained that the Senate "committee and our staffs are working with Representative Moss and his staff" in order to "mak[e] every effort to get one or the other or both [bills] through." *Administrative Procedure Act: Hearings on S. 1160 Before the Subcomm. on Admin. Practice and Procedure of the Senate Judiciary Comm.*, 89th Cong., 1st Sess. 226 (1965) (*1965 Senate Hearings*). Reflecting that coordinated effort, both bills took up where S. 1666 left off, adopting S. 1666's revised text for Exemption 2 that exempted matters "related solely to

the internal personnel rules and practices of any agency." S. 1160, 89th Cong., 1st Sess. 5 (1965) (§ 3(e)(2)); H.R. 5012, 89th Cong., 1st Sess. 3 (1965) (§ 161(c)(2)).[11]

a. In March and April 1965, Representative Moss presided over the first hearings in the 89th Congress to address the pending FOIA proposals, which were based "on many years of study" in the House of Representatives, the Senate, and the Executive Branch. See *Federal Public Records Law: Hearings on H.R. 5012 Before a Subcomm. of the House Comm. on Gov't Operations*, 89th Cong., 1st Sess. Pt. 1, at 1 (1965) (*1965 House Hearings*). Assistant Attorney General Schlei again testified, indicating that the Department of Justice was still "inclined to be critical" of the revised text of Exemption 2. *Id.* at 29.

Representative Moss addressed that lingering concern by clarifying that the revised text exempting "internal personnel rules and practices" (*1965 House Hearings* 2) was "intended to cover * * * instances such as the manuals of procedure that are handed to [a bank] examiner * * * , or the guidelines given to an FBI agent." *Id.* at 29. Assistant Attorney General Schlei agreed that the bill should protect such instructions to agency personnel "who, if they are going to operate in expectable ways, cannot do their jobs." *Id.* at 30. He therefore suggested that "the word 'personnel' should be stricken" due to his fear that the revised Exemption might still be read to "connot[e]" a more limited category of "employee relations, employee management rules and practices of an agency." *Id.* at 29-30. Representative Moss, however, expressed reluctance to make that change because deleting the term "personnel" might "open the barn door to everything." *Ibid.*

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[11] On the same day, Representative Fascell introduced a separate bill, which like several other simultaneously introduced House bills, was identical to H.R. 5012. See *1965 House Hearings* 2-3. That bill also abandoned the "employment"-rules-and-practices limitation in Representative Fascell's earlier FOIA bill and, instead, broadened Exemption 2 to cover "internal personnel rules and practices." H.R. 5013, 89th Cong., 1st Sess. 3 (1965) (§ 161(c)(2)).

The subsequent House Report on S. 1160 discussed the House's "extensive hearings on similar legislation —H.R. 5012 and [other] comparable House bills"—and specifically cited Representative Moss's colloquy with Assistant Attorney General Schlei to illustrate the scope of Exemption 2. *1966 House Report* 4, 10 & n.14 (citing *1965 House Hearings* 29-30); see *Rose*, 425 U.S. at 364.[12] The Report explained that "[o]perating rules, guidelines, and manuals of procedure for Government investigators or examiners would be exempt from disclosure" under Exemption 2. *1966 House Report* 10. And, echoing the Senate Report's earlier recognition that the Exemption's revised text in S. 1666 was "similar" to but "more tightly drawn" than the APA's predecessor exemption for "internal management" matters (pp. 32-33, *supra*), the House Report added that Exemption 2 "would not cover *all* 'matters of internal management' such as employee relations and working conditions and routine administrative procedures." *Ibid.* (emphasis added).

b. In May 1965—after the House Government Operations Committee held its hearings—Senator Long presided over the Senate's hearings on S. 1160 and related bills, which built upon the parallel hearings held in the

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[12] This Court has repeatedly relied upon the House hearings on H.R. 5012 to construe various provisions in FOIA. See, *e.g.*, *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 299 n.29 (1979); *Rose*, 425 U.S. at 375 n.14, 378 n.16; *Robertson*, 422 U.S. at 264 n.8.

House of Representatives. *1965 Senate Hearings* 1. The Senator noted that "Representative Moss has been very helpful" in the legislative process, emphasizing that the committees and staffs under his and Representative Moss's direction were collaborating to pass one or both of their parallel FOIA bills. *Id.* at 226. Several government and other witnesses briefly discussed Exemption 2 during the Senate's hearing, but no Senator present commented on that testimony or otherwise addressed the intended "scope of Exemption 2." *Crooker*, 670 F.2d at 1058 & nn.17-19 (concluding that the Senate hearings "provide little enlightenment as to Congress' intent concerning Exemption 2").

On October 4, 1965, the Senate Judiciary Committee reported S. 1160 without revising further the language of Exemption 2. 111 Cong. Rec. at 26,820-26,821; *1965 Senate Report* 8. The Senate Report emphasized that it is "necessary for the very operation of our Government to allow it to keep confidential certain material" and that S. 1160 sought to "balance the opposing interests" to produce a "workable formula" that would "protect[] all interests" and yield "the fullest responsible disclosure." *Id.* at 3. The Report briefly addressed Exemption 2. It stated that the Exemption "relates only to the internal personnel rules and practices of an agency" and added that "[e]xamples of these may be rules as to personnel's use of parking facilities or regulation of lunch hours, statements of policy as to sick leave, and the like." *Id.* at 8. Nine days later, the Senate adopted the Committee's amendments and passed S. 1160 without debate. 111 Cong. Rec. at 26,820-26,823.

c. The House Government Operations Committee reported S. 1160 to the full House of Representatives in May 1966, see *1966 House Report*, and, in June 1966, the

House of Representatives debated and passed the bill. 112 Cong. Rec. at 13,640-13,662. Representative Moss, who managed the debate, reassured "those few who may have doubts as to the wisdom of this legislation" that his committee "ha[d], with the utmost sense of responsibility, attempted to achieve a balance between a public need to know and a necessary restraint upon access to information" to ensure the "effective operation of the Government." *Id.* at 13,641; cf. *id.* at 13,655 (statement of then-Rep. Dole) (bill's exemptions "protect nine categories of sensitive Government information" to "afford[] the safeguards necessary to the effective functioning of Government"). Members repeatedly emphasized that the APA's prior exemption for "internal management" utilized "vague" terms that did not sufficiently constrain the scope of the exemption. See *id.* at 13,642 (Rep. Moss); *id.* at 13,644-13,645 (Rep. King) (APA's "internal management" exemption did not provide any "reasonable limitations" on the scope of exempt material); *id.* at 13,646-13,647 (Rep. Reid) (bill's exemptions are "more narrow[]" than APA's prior exemptions for, *inter alia*, "[m]atters of 'internal management'"). The debate also focused on several exemptions, including Exemption 2, which the House of Representatives was told would continue to "prevent[] the disclosure" of "'sensitive' Government information" such as an "[i]ncome tax auditors' manual," because that information "would be protected under No. 2" as "related solely to internal personnel rules and practices" of an agency. *Id.* at 13,659 (statement of Rep. Gallagher).

d. When Congress enacted FOIA, the import of Exemption 2 was apparent to the Department of Justice, which had been involved throughout the legislative process. The Attorney General's contemporaneous analysis of Exemption 2 explained that it concerns "those matters which are for the guidance of agency personnel only, including internal rules and practices which cannot be disclosed to the public without substantial prejudice to the effective performance of a significant agency function." Department of Justice, *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act* 30 (June 1967). Accordingly, the Attorney General stated, the Exemption applies to such internal records "to the extent that the proper performance of necessary agency functions requires such withholding" but, "when there is no strong reason for withholding," the Exemption "should not be invoked." *Id.* at 31.

3. Petitioner argues (at 22-24) that this Court should ignore the repeated descriptions of Exemption 2 in the House of Representatives for two principal reasons. First, petitioner asserts (at 22) that "[t]his Court agreed" with several lower courts that concluded that the Senate Report "is the more authoritative and controlling" expression of congressional intent. That is incorrect. The Court expressly declined "to take 'a firm stand on the issue.'" *Rose*, 425 U.S. at 367 (citation omitted). Morever, although the Court indicated its general agreement that is was appropriate to "rely upon the Senate report" because that Report was "before both houses of Congress" and the House Report was not, the Court emphasized that its agreement rested on the view that "the primary focus of the House Report was on exemption of disclosures that might enable the regulated to circumvent agency regulation," and that particular issue was not before the Court. *Id.* at 366-367 (citation omitted). Thus, for contexts in which no risk of circumvention is present, the Court simply chose "'to rely

upon the Senate Report' *in this regard.*" *Id.* at 367 (emphasis added).[13]

Second, petitioner incorrectly suggests (at 23-24 & n.7) that Members of the House of Representatives improperly sought to contradict statements in the Senate Report regarding the scope of Exemption 2 without changing the text of the bill. The understanding of Exemption 2's text in the House Report not only *predates* the Senate Report, it is consistent with the description of Exemption 2 in the earlier Senate Report that developed the relevant text. When the Senate finalized the language of Exemption 2 by expanding its coverage from only internal "employment" rules and practices to internal "personnel" rules and practices, it recognized that the Exemption was "similar" to the APA's broad exemption for internal agency "management," just "more tightly drawn." See pp. 32-33, *supra.* That understanding itself contradicts petitioner's view that Exemption 2 targets only a small set of trivial employment matters. Moreover, Senator Long and Representative Moss closely coordinated their subsequent legislative efforts based on the same text for Exemption 2 and, well before the 1965 Senate Report, Representative Moss explained the intent underlying that exemption. See pp. 33-35, *supra*.

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[13] Petitioner places undue reliance (at 22) on *Rose*'s observation that, in 1976, nearly all courts to have considered the differences between the Reports had concluded that the Senate Report more accurately reflected the scope of Exemption 2. See *Rose*, 425 U.S. at 364 & n.5 (citing decisions by two courts of appeals and two district courts). *Rose* expressly declined to decide whether those courts were correct, and none of those pre-*Crooker* decisions comprehensively surveyed Exemption 2's drafting history. The decisions, for instance, neither addressed Congress's decision to expand Exemption 2 from just internal "employment rules and practices" to "personnel" rules and practices, nor properly analyzed the role of the APA exemption from which Exemption 2 took its text.

The subsequent Senate Report does not contradict the view that Exemption 2 applies when disclosure would risk circumvention of agency functions. By its own terms, the Report simply lists "[e]xamples" of some matters that "may be" protected by Exemption 2; it does not purport to define the Exemption's limits. See pp. 36-37, *supra*. The Senate then passed the FOIA bill without any debate suggesting that any Senator understood the Report's list of examples to reflect the limits of Exemption 2. 111 Cong. Rec. at 26,820-26,821.

In that context, where nothing in the Senate's consideration of Exemption 2 contradicted the understanding articulated in the House of Representatives, and where the House and Senate proponents closely coordinated their joint efforts to enact FOIA, there is no sound basis to conclude that the House Report reflects anything but the prevailing understanding of Exemption 2 within Congress when it enacted FOIA.[14]

E. *Crooker* Correctly Construed Exemption 2 And Congress Has Since Ratified *Crooker*'s Interpretation Of Exemption 2

1. The en banc D.C. Circuit correctly concluded in *Crooker* that Exemption 2 applies to records concerning "rules and practices governing agency personnel" that

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[14] The House Report indicates that Exemption 2 would not cover "all 'matters of internal management' such as employee relations and working conditions and routine administrative procedures." *1966 House Report* 10. That understanding that not "all" such matters would be exempt from disclosure is consistent with this Court's holding in *Rose* that employment-related matters are not exempt from disclosure if there is a significant public interest in disclosure and no countervailing government interest warranting withholding.

meet the test of "predominant internality" if disclosure would "significantly risk[] circumvention" of federal agency functions. 670 F.2d at 1053, 1074. As then-Judge Ginsburg explained, that conclusion comports with "the language of Exemption 2" and properly reflects "'the overall design of FOIA, the explicit comments made in the House, the cautionary words of the Supreme Court in *Rose*, and even common sense.'" *Id.* at 1090 (R.B. Ginsburg, J., concurring).

The "words 'personnel rules and practices' encompass not merely minor employment matters, but may cover other rules and practices governing agency personnel" in the discharge of their governmental duties. *Crooker*, 670 F.2d at 1056. Although "personnel" in some contexts may properly be understood more narrowly to concern only "employment" matters, Congress, as explained, specifically rejected such a textual limitation for Exemption 2. See pp. 32-33, *supra*.

Crooker also correctly concluded that the Exemption's application to matters that "relat[e] solely" to an agency's "internal" rules and practices for its personnel indicates that the Exemption covers records that are "designed to establish rules and practices for agency personnel" in preforming agency functions that cannot be publicly released without "risk[ing] circumvention" of those functions. 670 F.2d at 1056-1057, 1073. That understanding follows directly from the interpretation of Exemption 2's direct predecessor in the APA for matters "relating solely" to an agency's "internal" management. See pp. 22-25, *supra*. Like those pre-FOIA decisions, *Crooker* makes clear that Exemption 2 applies even though the matters at issue "have some effect on the public-at-large," because "there are few events in our society today that occur without so much as a tiny ripple effect outside their area of prime impact." 670 F.2d at 1073 (citation omitted). And when such matters cannot be disclosed without "significantly risk[ing]" the circumvention of agency functions, *id.* at 1074, the records at issue qualify as matters that, by necessity, relate solely to those agency rules and practices that are properly "internal" and not for external distribution.

2. a. This Court should uphold *Crooker's* interpretation of Exemption 2 for an additional reason: Congress has itself approved *Crooker's* analysis in subsequent legislation. Congress's 1986 amendment to Exemption 7(E) modified that exemption to apply to records compiled for law enforcement purposes if producing the records "would disclose guidelines for law enforcement investigations or prosecutions" and "disclosure could reasonably be expected to *risk circumvention of the law.*" 5 U.S.C. 552(b)(7)(E) (emphasis added); see Freedom of Information Reform Act of 1986, Pub. L. No. 99-570, Tit. I, Subtit. N, § 1802(a), 100 Stat. 3207-49 (*1986 Act*). The legislative history of the *1986 Act* makes clear that the amendment was directly modeled on "the 'circumvention of the law' standard that the D.C. Circuit established in its en banc decision in *Crooker* v. *BATF*, 670 F.2d 1051 (D.C. Cir. 1981) (en banc) (interpreting Exemption 2)." 132 Cong. Rec. 29,620 (1986) (reproducing S. Rep. No. 221, 98th Cong., 1st Sess. 25 (1983) (*1983 Senate Report*)). As the Seventh and Ninth Circuits have explained, that 1986 amendment indicates that "*Crooker* accurately expresses congressional intentions" regarding Exemption 2, "[b]ecause Congress saw fit to codify the very language of *Crooker*, and because nothing in the legislative history of the Reform Act suggests the slightest disagreement with that case's holding."

Kaganove v. *EPA*, 856 F.2d 884, 889 (7th Cir. 1988), cert. denied, 488 U.S. 1011 (1989); accord Pet. App. 37.

To be sure, ordinarily "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *Massachusetts* v. *EPA*, 549 U.S. 497, 530 n.27 (2007) (citation omitted). But where, as here, Congress amends one part (Exemption 7(E)) of a balanced and integrated set of statutory provisions in light of its understanding of how another pre-existing part (Exemption 2) functions, Congress is properly understood to endorse both the newly enacted provision and the complementary understanding of the pre-existing provision. Closely related, subsequent enactments like the amendment to Exemption 7(E) "can shape or focus" the "range of plausible meanings" that may be given to Exemption 2 as originally enacted. See *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000). That reasoning holds particular force here, because Congress clearly understood Exemption 2 to encompass a particular test that it expressly adopted in a related section of the same statute.[15]

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[15] This Court in *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008), followed a similar course. In *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), this Court held that Section 10(b) of the Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C. 78a *et seq.*, imposes primary securities fraud liability but not aider and abettor liability. *Stoneridge* recognized that Congress responded to *Central Bank* by amending another provision of the Exchange Act to establish aider-and-abettor liability in actions brought by the Securities and Exchange Commission. 552 U.S. at 157, 162. That subsequent congressional action, the Court concluded, indicated that *primary* liability under Section 10(b) should not be understood to capture even affirmatively deceptive acts by an aider or abettor because doing so would undermine Congress's deter-

b. Petitioner does not directly challenge the Ninth Circuit's reasoning in this regard. He instead argues that the 1986 amendment of Exemption 7(E) should not be read as endorsing *Crooker*'s interpretation of Exemption 2 because the amendment's text originated from a bill in the prior (98th) Congress that would have also amended Exemption 2. Pet. Br. 33-35. Petitioner's reliance on *inaction* by an *earlier* Congress does not undermine *Crooker*'s express ratification by the 99th Congress, which never considered amending Exemption 2 when it revised Exemption 7(E). And even if the legislative history from the 98th Congress were relevant, the history merely shows that the 98th Congress's reasons for amending Exemptions 2 and 7(E) were distinct. Indeed, in light of *Crooker*'s preexisting interpretation of Exemption 2, Congress appears to have found it necessary only to amend Exemption 7(E) to clarify the law.

The 1986 amendment to Exemption 7(E) took its text from S. 774, which Senator Hatch introduced in the 98th Congress. See 132 Cong. Rec. at 27,189 (statement of Sen. Leahy) (explaining that the text of the FOIA amendments was "identical" to that in S. 774 and that the 1983 Senate Report on S. 774 explained the "meaning and intended effect of the amendments"); *id.* at 29,619-29,620 (statement of Rep. Kindness) (similar; reproducing *1983 Senate Report* 22-25).[16] The amend-

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mination in a related provision that aider-and-abetter liability would apply in actions by the SEC but not private individuals. *Id.* at 162-163.

[16] S. 774 passed the Senate in 1984, 130 Cong. Rec. 3521 (1984), but it did not pass the House of Representatives before the end of the 98th Congress. The portion of S. 774 amending FOIA Exemption 7 was then reintroduced in the 99th Congress as part of a Senate bill (S. 2878), which the Senate adopted and passed as an amendment to the Anti-Drug Abuse Act of 1986 (H.R. 5484). See 132 Cong. Rec. at 26,111

ment to Exemption 7(E) to cover "guidelines for law enforcement investigations or prosecution" if disclosure could "risk circumvention of the law," 5 U.S.C. 552(b)(7)(E), addressed the "confusion created by the D.C. Circuit's en banc holding in *Jordan* v. [*DOJ*], 591 F.2d 753 (D.C. Cir. 1978), denying protection for prosecutorial discretion guidelines under [Exemption 2]." 132 Cong. Rec. at 29,620 (reproducing *1983 Senate Report* 25). Specifically, although the en banc court in *Crooker* had made clear that it rejected its earlier "legal holdings in *Jordan*," *Crooker* emphasized that "the result in *Jordan* * * * would be the same" under its revised reading of Exemption 2. 670 F.2d at 1074-1075. As then-Judge Ginsburg explained, "spar[ing] the *Jordan* judgment while abandoning the *Jordan* rationale * * * cloud[ed] an otherwise clear pronouncement" and left the lower courts without a "secure guide" to evaluate future Exemption 2 cases involving prosecution guidelines. *Id.* at 1091-1092 (R.B. Ginsburg, J., concurring). Congress therefore amended Exemption 7(E) to cover such guidelines within Exemption 7 without disturbing *Crooker*'s otherwise clear understanding of Exemption 2. See 130 Cong. Rec. at 3502 & n.39 (statement of Sen. Hatch) (amendment "repudiated" *Jordan* to the extent *Jordan* "retains any vitality in the wake of *Crooker*").

As petitioner notes, Senator Hatch's bill in the 98th Congress also proposed amending Exemption 2. The amendment would have revised the text to clarify that matters relating solely to internal personnel rules and practices "includ[e] such materials as * * * manuals and instructions to investigators, inspectors, auditors, or

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(S. 2878, § 1801(a)); *id.* at 26,473, 27,208, 27,251-27,252 (H.R. 5484, § 1801). Congress ultimately enacted H.R. 5484 into law. See *1986 Act* § 1802(a), 100 Stat. 3207-48.

negotiators, to the extent such manuals and instructions could reasonably be expected to jeopardize investigations, inspections, audits, or negotiations." S. 774, § 8, 98th Cong., 1st Sess. (1983); see *1983 Senate Report* 44-45. The Senate Report on S. 774 expressly recognized that Exemption 2 case law had already "evolved to hold that such materials are protected under the exemption if disclosure would harm law enforcement efforts," *id.* at 21 (citing the "discussion of caselaw in *Crooker*"), but the Report explained that decisions had "not been uniform as to the *degree* of harm an agency must demonstrate to justify its withholding." *Ibid.* (emphasis added). The proposed amendment to Exemption 2 was thus intended to clarify the requisite showing of harm. *Ibid.* There was no suggestion in the Senate Report that an amendment would have been necessary simply to confirm that *Crooker's* circumvention-of-regulation test was itself correct.[17]

Although one cannot say with confidence why the 99th Congress did not seek to amend Exemption 2 in the manner proposed by S. 774 in the 98th Congress, its inaction cannot properly be read to imply any disagreement with *Crooker*. The ACLU itself concluded at the time that "[a]ny change in the current exemption language [wa]s unnecessary" because "the *en banc* ruling

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[17] The text of the proposed amendment reinforces that understanding. By using the terms "including" and "such as" to introduce an illustrative list of materials covered by the Exemption, the proposal confirms the drafters' understanding that Exemption 2's original text already exempted such material from disclosure. See *Federal Land Bank* v. *Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941) (The term "'including' * * * connotes simply an illustrative application of the general principle."); see also *P.C. Pfeiffer Co.* v. *Ford*, 444 U.S. 69, 77 n.7 (1979) ("including" indicates an element that "necessarily" is "part of the larger group").

* * * in *Crooker*" had "created a viable working standard under which the confidentiality concerns embodied in the proposed amendments [to Exemption 2] can be met." *Freedom of Information Reform Act: Hearings on S. 774 Before the Subcomm. on the Constitution of the Senate Judiciary Comm.*, 98th Cong., 1st Sess. 544-545 (1983). In light of that position, Public Citizen's current reliance (on behalf of the ACLU and others) on the abandoned provisions of S. 774 is ill founded. Cf. Public Citizen Amici Br. 17-18.

F. The ESQD Information At Issue In This Case Was Properly Withheld Under Exemption 2

The ESQD information at issue in this case falls squarely within Exemption 2 as construed above. First, the information is itself intended for the internal use of Navy personnel in discharging of their ordnance-related duties at NMII. It has been maintained internally within the Navy for that purpose and has been shared with local first responders only in confidence to facilitate official and important planning functions in the event of an emergency at NMII. The records in no way constitute "secret law" establishing regulatory procedures or standards that the public properly should know to either invoke or follow.

The public disclosure of the ESQD information would undermine the important safety-related functions for which Navy personnel use ESQD information at NMII. Publicly disclosing the information would significantly risk undermining the Navy's ability to safely and securely store military ordnance. Disclosure of that information would allow individuals to determine the location, type, and quantity of explosives stored at NMII as well as a host of other information the disclosure of which would undermine the Navy's ability to store military munitions safely. See pp. 8-9, *supra*. If that information must be released to petitioner under FOIA, it must be released to the world, including those with less facially benign motives.[18]

G. Petitioner Advances An Unduly Narrow Reading Of Exemption 2 That Does Not Account For The Exemption's Important Function Within FOIA

Petitioner repeatedly invokes (at 10, 13-14, 26) the general principle that FOIA embodies a presumption of disclosure, subject to narrow exemptions, to support his position. Petitioner's reliance on such a presumption misunderstands this Court's traditional, balanced approach to FOIA and disregards the important function that Exemption 2 serves in FOIA's carefully developed statutory regime.

1. This Court has made clear that its "pronouncements of liberal congressional purpose" be understood together with Congress's intention to give FOIA's exemptions "meaningful reach and application." *John Doe Agency* v. *John Doe Corp.*, 493 U.S. 146, 152 (1989). Congress established in FOIA a "basic policy" favoring disclosure, but it simultaneously recognized that "important interests [are] served by the exemptions." *FBI*

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[18] This Court has "repeatedly" emphasized that "Congress 'clearly intended' the FOIA 'to give any member of the public as much right to disclosure as one with a special interest in a particular document.'" *Reporters Comm.*, 489 U.S. at 771 (brackets omitted). FOIA thus does not permit agencies merely to "allow[] only the requester" to obtain such records. *NARA* v. *Favish*, 541 U.S. 157, 174 (2004) ("[O]nce there is disclosure [to a FOIA plaintiff], the information belongs to the general public."). All members of the public "have the same access under FOIA" as particular requesters, like petitioner here. See *Department of Defense* v. *FLRA*, 510 U.S. 487, 501 (1994).

v. *Abramson*, 456 U.S. 615, 630-631 (1982). Those exemptions embody Congress's common-sense determination that "public disclosure is not always in the public interest." *CIA* v. *Sims*, 471 U.S. 159, 166-167 (1985). For that reason, the "Court consistently has taken a practical approach" in interpreting FOIA's exemptions, in order to strike a "workable balance" between the public's general interest in disclosure and "the needs of Government to protect certain kinds of information from disclosure." *John Doe Agency*, 493 U.S. at 157; *Weinberger* v. *Catholic Action of Haw./Peace Educ. Project*, 454 U.S. 139, 144 (1981) (Congress "balance[d] the public's need for access to official information with the Government's need for confidentiality.").

The notion that FOIA's primary disclosure goal should curtail the very exemptions that Congress deemed necessary to protect important countervailing interests fails to reflect accurately the balance struck by Congress. "[N]o legislation"—including FOIA—"pursues its purposes at all costs." *Rodriguez* v. *United States*, 480 U.S. 522, 525-526 (1987) (per curiam). And to "assume that *whatever* furthers the statute's primary objective must be the law" "frustrates rather than effectuates legislative intent," because it fails to reserve for Congress the difficult judgments inherent in nearly all legislative decisions. *Id.* at 526; see also *Director, Office of Workers' Comp. Programs* v. *Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 136 (1995) ("Every statute proposes, not only to achieve certain ends, but also to achieve them by particular means—and there is often a considerable legislative battle over what those means ought to be.").

Rose itself acknowledges that FOIA's exemptions "represent[] the congressional determination of the types of information that the Executive Branch *must* have the option to keep confidential" and that the exemptions reflect Congress's "workable formula" that "protects all interests" in order to pursue the "fullest *responsible* disclosure." 425 U.S. at 361-362 (quoting *Mink*, 425 U.S. at 80) (emphasis added). *Rose* thus agreed that where disclosure would "not significantly harm" any government interest, it is appropriate to read Exemption 2 in light of a policy "favoring disclosure." *Id.* at 365-366 (citation omitted). But here, where significant countervailing interests are at stake, petitioner's suggestion to put a thumb on Congress's carefully designed balance distorts rather than effectuates Congress's intent.

Indeed, the overall structure of FOIA's exemptions counsels strongly against petitioner's unduly narrow understanding of Exemption 2. Congress enacted FOIA with nine substantial exemptions, each of which addresses a significant reason to permit the government to withhold information from the public. The exemptions protect (1) national-security secrets, (3) matters "specifically" exempt from disclosure under other statutes, (4) privileged or confidential trade secrets and commercial or financial information, (5) inter-agency and intra-agency memoranda and letters that would not be available to a private party in litigation against the government, (6) personal privacy when disclosure would constitute a "clearly unwarranted" invasion, (7) specific information compiled for law-enforcement purposes, (8) information in reports by agencies regulating financial institutions, and (9) geological and geophysical information concerning wells. See 5 U.S.C. 552(b). The contention that Congress passed Exemption 2—between exemptions for national-security secrets and matters that Congress itself specifically exempted in other statutes—only to protect "[]trivial" and "routine employee relations matters that are of no public interest," Pet. Br. 10, 12, fails to recognize that Congress enacted FOIA's exemptions for the "types of information that the Executive Branch *must* have the option to keep confidential." *Rose*, 425 U.S. at 361 (citation omitted; emphasis added). To ascribe the intent to exempt only trivial matters, and then only when they involve agency rules and practices concerning "employee relations," is inconsistent with Congress's overall scheme in FOIA for addressing what it deemed "necessary interests of confidentiality." *1965 Senate Report* 10.

2. Exemption 2 properly protects a wide range of information concerning internal rules and practices for agency personnel where disclosure would significantly risk circumvention of agency functions, and where other FOIA exemptions are unavailable. Petitioner's unduly narrow interpretation of the Exemption would leave a significant hole in the careful balance that Congress struck in FOIA.

Numerous examples illustrate Exemption 2's importance in the statutory scheme. The Exemption protects against the circumvention of agency functions at issue in, for example, guidelines for the conduct of internal audits, *Judicial Watch, Inc.* v. *Department of Commerce*, 337 F. Supp. 2d 146, 165-166 (D.D.C. 2004), guidelines for reviewing claims submitted by Medicare providers, *Dirksen* v. *HHS*, 803 F.2d 1456, 1458-1459 (9th Cir. 1986), document-classification instructions identifying which aspects of a military program are most sensitive, *Institute for Policy Studies* v. *Department of the Air Force*, 676 F. Supp. 3, 4-5 (D.D.C. 1987), records concerning agency computer-security plans, *Schreibman*

v. *Department of Commerce*, 785 F. Supp. 164, 165-166 (D.D.C. 1991), building blueprints used for ongoing operations at facilities conducting research into biological agents and toxins, *Elliott* v. *Department of Agric.*, 518 F. Supp. 2d 217, 218-221 (D.D.C. 2007), aff'd 596 F.3d 842 (D.C. Cir.), cert. denied, 130 S. Ct. 3430 (2010), and non-public information on "the security of the Supreme Court building and the security procedures for Supreme Court Justices," *Voinche* v. *FBI*, 940 F. Supp. 323, 329 (D.D.C. 1996), aff'd, No. 96-5304, 1997 WL 411685 (D.C. Cir. 1997), cert. denied, 552 U.S. 950 (1997).

Petitioner asserts (at 35) that Exemption 2's protections for sensitive internal government information is "no longer necessary" in light of Exemptions 1, 3, and 7. See also Public Citizen Amici Br. 25-26. That suggestion falters on several grounds. First, even if different exemptions might overlap in certain circumstances, such overlap does not justify curtailing the scope of Exemption 2. See *Abramson*, 456 U.S. at 629 (rejecting similar argument favoring restrictive reading of Exemption 7(C) because of overlapping privacy protections in Exemption 6). "[T]he legitimate interests in protecting information from disclosure" in order to protect the distinct interest in preventing the circumvention of agency functions under Exemption 2 are not "satisfied by other exemptions." See *ibid.*; compare *Sims*, 471 U.S. at 167-181 (Exemption 3 statute authorizes withholding of declassified CIA records regarding intelligence sources), with *id.* at 183-184 & n.3, 188-191 (Marshall, J., concurring in the result) (concluding that Exemption 3 statute should be interpreted not to apply where Exemption 1 might be invoked).

In any event, Exemption 7(E)'s protection for law-enforcement techniques and guidelines for "investigations or prosecutions" targets only a subset of the important agency functions that may be circumvented. None of FOIA's other exemptions address Exemption 2's rationale for withholding the internal rules and procedures for agency personnel.

Similarly, Exemption 3 applies only where Congress has "specifically" exempted the same records under another statute. 5 U.S.C. 552(b)(3) (Supp. III 2009). Requiring Congress to enact a multitude of specific withholding statutes in the numerous contexts in which disclosure of internal instructions to agency personnel would undermine agency functions would undercut the very rationale for having an exemption within FOIA itself that applies *generally* whenever the government can establish a significant risk of such circumvention.

Finally, petitioner's suggestion (at 35) that any harm may be prevented in this case by classifying the Navy's ESQD maps and data to avoid disclosure under Exemption 1 reflects a fundamental misapprehension of the problem. Exemption 1 apples to records properly classified under an Executive Order of the President. 5 U.S.C. 552(b)(1). Even if ESQD information might satisfy the requirements for classification, classification would trigger special access and handling requirements unworkable here: Only persons who are determined to be eligible for access to national security information, have signed an appropriate non-disclosure agreement, and have an official need to know may be given such information, and only after appropriate training. And classified information must then be transmitted using systems and stored in locations that satisfy particular security requirements. See Exec. Order No. 13,526,

§§ 4.1, 6.1(dd), 75 Fed. Reg. 707, 720-721, 729 (2009).[19] Yet to prepare appropriately for emergency response contingencies, the Navy requires the flexibility to share certain ESQD information on a confidential basis with non-federal personnel who lack the necessary security clearances and facilities, *i.e.*, local first responders who might be called upon (and must plan) to access NMII in an emergency. See J.A. 59-60; Pet. App. 41.

3. Petitioner argues (at 37-39) that if Exemption 2 does cover any material beyond trivial employment-related matters, it should be limited to circumstances in which public disclosure would "risk circumvention of an agency regulation by a person or entity subject to regulation by the agency in question." Petitioner relies on *Rose* for this proposition, but *Rose* itself made clear that it "need not consider" whether Exemption 2 applies when disclosing the "manuals and guidelines used by [an] agency in discharging its regulatory function" would risk "circumvention of agency regulations." 425 U.S. at 364. Petitioner's suggestion that the only circumvention of agency functions that Exemption 2 can cover is circumvention by a specific type of regulated

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[19] Classification depends, among other things, on a finding that the information concerns certain subject-matter categories (such as intelligence activities; military plans, weapons systems, or operations; or vulnerabilities of installations relating to the national security) and a determination that the unauthorized disclosure of that information "reasonably could be expected to result in damage to the national security," *i.e.*, damage to "the national defense or foreign relations of the United States." See Exec. Order No. 13,526, §§ 1.1(a)(3) and (4), 1.4, 6.1(cc), 75 Fed. Reg. at 707, 709, 729. The current Executive Order for classified national security information, which became effective June 27, 2010, made no changes that are material to this case. Cf. *id.* § 6.2(g), 75 Fed. Reg. at 731 (replacing Executive Order No. 12,958, 3 C.F.R. 333 (1996), as amended by Executive Order No. 13,292, 3 C.F.R. 196 (2004)).

entity disregards the "workable formula" that Congress established in FOIA for "the fullest *responsible* disclosure" that would prevent "significant[] harm [to] specific governmental interests." *Id.* at 362, 365 (citations omitted; emphasis added). Petitioner points to no textual or logical basis for his rigid test, which as this case shows, would permit the very harms against which FOIA was designed to protect.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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OCTOBER 2010

APPENDIX

1. The Freedom of Information Act, 5 U.S.C. 552,[*] provides in pertinent part:

Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

* * * * *

(b) This section does not apply to matters that are—

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), if that statute—

(A)(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or

(ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and

(B) if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph.

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[*] As amended by the OPEN FOIA Act of 2009, Pub. L. No. 111-83, § 564(b), 123 Stat. 2184 (amending 5 U.S.C. 552(b)(3)).

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

* * * * *

2. The Freedom of Information Act, 5 U.S.C. 552 (1982), provided in pertinent part:

Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

* * * * *

(b) This section does not apply to matters that are—

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

* * * * *

3. The Freedom of Information Act, Pub. L. No. 89-487, 80 Stat. 250 (as enacted in 1966), provided in pertinent part:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 3, chapter 324, of the Act of June 11, 1946 (60 Stat. 238), is amended to read as follows:

"SEC. 3. Every agency shall make available to the public the following information:

* * * * *

"(e) EXEMPTIONS.—The provisions of this section shall not be applicable to matters that are (1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy; (2) related solely to the internal personnel rules and practices of any agency; (3) specifically exempted from disclosure by statute; (4) trade secrets and commercial or financial information obtained from any person and privileged or confidential; (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a private party in litigation with the agency; (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; (7) investigatory files compiled for law enforcement purposes except to the extent available by law to a private party; (8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of any agency responsible for the regulation or supervision of financial institutions; and (9) geological and geophysical information and data (including maps) concerning wells.

* * * * *

4. Section 3 of the Administrative Procedure Act, 5 U.S.C. 1002 (1964), provided:

Publication of information, rules, opinions, orders and public records

Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of an agency—

(a) Every agency shall separately state and currently publish in the Federal Register (1) descriptions of its central and field organization including delegations by the agency of final authority and the established places at which, and methods whereby, the public may secure information or make submittals or requests; (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations; and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law. No person shall in any manner be required to resort to organization or procedure not so published.

(b) Every agency shall publish or, in accordance with published rule, make available to public inspection all final opinions or orders in the adjudication of cases (except those required for good cause to be held confidential and not cited as precedents) and all rules.

(c) Save as otherwise required by statute, matters of official record shall in accordance with published rule be made available to persons properly and directly concerned except information held confidential for good cause found.

REPLY
BRIEF

No. 09-1163

Supreme Court, U.S.
FILED
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In The
Supreme Court of the United States

GLEN SCOTT MILNER,
Petitioner,

v.

UNITED STATES DEPARTMENT OF THE NAVY,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

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TABLE OF CONTENTS

SUMMARY OF REPLY 1

ARGUMENT 2

FOIA Exemption 2 Allows Agencies to Withhold Only Routine Internal Employment Related Matters That Are of No Public Interest 2

A. The Interpretation Urged by the Navy Conflicts with the Plain Language of Exemption 2 2

B. Congress's 1966 Enactment of FOIA Made Sweeping Changes to Its Predecessor, Section 3 of the APA 5

C. Legislative History Does Not Support High 2 8

D The Concerns Addressed by the 1966 House Report and Policy Concerns that Informed *Crooker* Were Resolved by Congress in Its 1986 Amendment Adding to Exemption 7(E) 18

E Congress Struck a Balance in FOIA and Mandated Full Agency Disclosure Unless the Information Sought Falls Within One of the Narrow Exemptions 22

CONCLUSION 26

TABLE OF AUTHORITIES

Cases

CIA v. Sims, 471 U.S. 159 (1985) 22

Crooker v. Bureau of Alcohol, Tobacco and Firearms, 670 F 2d 1051 (D.C. Cir. 1981) .... passim

Department of the Air Force v. Rose, 425 U.S 352 (1976) .... passim

EPA v Mink, 410 U S. 73 (1973) 7, 23

FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000) 19

Garcia v United States, 469 U.S. 70 (1984) 14

Jerman v Carlisle, McNellie, Rini, Kramer & Ulrich, 130 S. Ct. 1605 (2010) 6

John Doe Agency v. John Doe Corp., 493 U.S. 146 (1989) 22

Jordan v. U.S. Department of Justice, 591 F 2d 753 (D.C. Cir. 1978) 5, 20, 21

Milner v. U S. Department of the Navy, 575 F.3d 959 (9th Cir 2009) 2

Russell Motor Car Co. v. United States, 261 U.S. 514 (1923) ... 18

Samantar v. Yousuf, 130 S. Ct. 2278 (2010) ... 18

Statutes

5 U.S.C. § 1002 (1964) ... passim

5 U.S.C. § 552 ... 1

5 U.S.C. § 552(b) ... 22

5 U.S.C. § 552(b)(2) ... passim

5 U.S.C. § 552(b)(7)(E) ... 18, 20, 21

Other Authorities

109 Cong. Rec. 19,530 (1963) ... 6

111 Cong. Rec. 2,780 (1965) ... 16

111 Cong. Rec. 26,821 (1965) ... 17

111 Cong. Rec. 27,055 (1965) ... 17

112 Cong. Rec. 13,659 (1966) ... 14, 21

132 Cong. Rec. 29,620 (1986) ... 20

Davis, K., Administrative Law Treatise, § 3A 31 (1970 Supp) ... 13

Davis, K., Administrative Law Treatise, § 5.30 (2d ed 1978) 14

Davis, K., Pierce, R., Administrative Law Treatise, § 5.8 (1994) 21

Federal Public Records Law: Hearings on H R. 5012 Before a Subcomm. of the House Comm. On Gov't Operations, 89th Cong., 1st Sess. Pt. 1 (1965) ...passim

Freedom of Information. Hearings on S. 1666 Before the Subcomm. on Admin Practice and Procedure of the Senate Judiciary Comm., 88th Cong., 1st Sess. (1963) 6, 10, 11

H R. 5012, 89th Cong., 1st Sess. (1965) 25

H R Rep. No. 1497, 89th Cong , 2d Sess (1966) . 7,13, 21

S 1160, 89th Cong., 1st Sess. (1965).... 13, 14, 16, 17

S. 1666, 88th Cong., 1st Sess. (1963). ....passim

S. Rep. No. 1219, 88th Cong., 2d Sess. (1964)..passim

S. Rep No. 813, 89th Cong., 1st Sess. (1965).....passim

Webster's Unabridged Dictionary, Second Edition (2001) 4

SUMMARY OF REPLY

As this Court explained in *Department of the Air Force v. Rose*, 425 U.S. 352 (1976), the Freedom of Information Act, 5 U.S.C. § 552, was enacted in 1966 as a complete overhaul of the "public disclosure" section of the APA. 5 U.S.C. § 1002 (1964) ("Section 3"). Section 3 was widely recognized as falling far short of its disclosure goal because it allowed agencies almost unbridled discretion to decide what documents to make available to the public. Congress ignored requests by agencies and the Department of Justice to leave discretion in place and instead tipped the balance sharply in favor of disclosure by replacing the former "vague phrases" in Section 3 with nine concrete specific exemptions, and requiring agencies to release documents that did not fit within the exemptions.

The Navy seeks a return to pre-FOIA days by urging this Court to ignore the plain language of Exemption 2, 5 U.S.C. § 552(b)(2), and instead turn Exemption 2 into a catchall general exemption that would restore the same unbridled discretion that existed prior to FOIA. The Navy seeks to expand exemption 2 to allow agencies to withhold "a wide range of information concerning internal rules and practices where disclosure would significantly risk circumvention of agency functions and where other FOIA exemptions are unavailable." Resp. Br. at 51.

But it is the role of Congress to balance the need for release of government documents with legitimate needs for withholding documents, not federal agencies or the courts. The Navy's argument that Exemption 2 should provide a catchall authorization to legislate new exemptions for a "wide range" of materials that are acknowledged to be of substantial public interest starkly illustrates how far from the actual statute this course of judicial lawmaking has strayed

ARGUMENT

FOIA Exemption 2 Allows Agencies to Withhold Only Routine Internal Employment Related Matters That Are of No Public Interest

A. The Interpretation Urged by the Navy Conflicts with the Plain Language of Exemption 2

Exemption 2 provides that an agency may exempt from mandatory disclosure only records that are "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2). The Ninth Circuit in *Milner v. U.S. Department of the Navy,* 575 F.3d 959 (9th Cir 2009), adopted the D.C. Circuit's reasoning and concluded that Exemption 2 extends beyond mere, or trivial, employment rules and practices to all information that is both "predominantly internal" and the "disclosure of which would present a risk of circumvention of agency regulation." 575 F.3d at 965, *citing Crooker v. Bureau of Alcohol, Tobacco* *and Firearms*, 670 F.2d 1051, 1073-75 (D.C. Cir. 1981).

The Navy now abandons *Crooker's* analysis (while defending the decision as "pathmarking"). The Navy instead embarks on an entirely new dissection of the statutory language to present a novel, even broader, interpretation of the plain language of Exemption 2. Resp. Br. at 20-22. The Navy urges an overwhelming expansion of Exemption 2 to capture "materials that are maintained by an agency for the internal use of its personnel, so long as those matters are directly related to internal rules and practices that an agency establishes to guide its personnel in the performance of various agency functions." *Id.* at 21. Moreover, the Navy also asks the Court to allow federal agencies rather than Congress to decide when materials can be withheld based on an "agency's need." *Id.*

The Navy's construction of Exemption 2 rests on two faulty premises. First, it asks this Court to redefine the phrase "personnel rules and practices of an agency" to rules and practices that "guide the manner in which agency personnel discharge their official duties and perform governmental functions." *Id.* at 20-21. But this interpretation converts the commonly understood and most natural use of the phrase "personnel rules and practices" from rules and practices *governing* "personnel" to all rules and practices *used* by personnel. Under the Navy's reading, every single department in a company could be called a "personnel department" because it contains personnel, and every agency in the government could be called the Office of Personnel and Management because it contains personnel who are managed.

As defined by *Webster's*, "personnel" refers to "1. a body of persons employed in an organization or place of work ... 3. See personnel department." *Webster's Unabridged Dictionary, Second Edition*, 1446 (2001) [P]ersonnel department" is defined by *Webster's* to mean "the department in an organization dealing with matters involving employees, as hiring, training, labor relations, and benefits. Also called human resources department." *Id.* Because the term "personnel" is synonymous with "employee" "personnel rules and practices" plainly refers to employee relations rather than rules and practices used by employees to conduct government functions. The Navy turns the common meaning of "personnel rules and practices" on its head.

Second, while referring to *Crooker* as "pathmarking," Resp. Br. at 13, the Navy abandons *Crooker's* expansion of the phrase "related solely to" to "predominately related to," and now further contorts and expands the meaning of the phrase. Instead of "solely" meaning "exclusively," the Navy argues "solely" means, in effect, "directly." Resp. Br. at 21. The Navy provides no support for its creative rewriting of these common words.[1] By changing "solely" to "directly" the Navy's reading changes the limiting phrase "related solely to" to an expansive phrase meaning "associated" or "connected" with. Resp Br. at 21. The Navy's effort writes "solely" out of the statute and concludes that not only are "personnel rules and practices" exempt from disclosure, but all matters directly associated or connected with the Navy's broad reading of "rules and practices" are exempt. The Navy's interpretation directly conflicts with the terms of the statute. "Solely" is a modifier of "related" and serves to "emphasize the limited scope" of the exemption. *Jordan v. U S Department of Justice*, 591 F 2d 753, 763 (D C Cir 1978) (en banc).

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[1] "Solely" means "exclusively or only," or "merely" *Webster's*, 1815. "Direct" or "directly" means "absolute or exact" or "precisely." *Id.*, 559

A proper narrow reading of the plain meaning of "related solely to the internal personnel rules and practices of an agency" limits the exemption to matters related exclusively to internal rules and practices that concern agency employee relations. 5 U.S.C. § 552(b)(2). *Rose*, 425 U.S. at 362-63. This case should start and end with the plain language of the statute.

B. Congress's 1966 Enactment of FOIA Made Sweeping Changes to Its Predecessor, Section 3 of the APA

The Navy attempts to bolster its flawed "plain language" argument first with the astonishing assertion that in enacting FOIA in 1966, Congress "chose" to accept judicial interpretations of the former Section 3 of the APA. 5 U.S.C. § 1002 (1964). Resp. Br. at 22-27. This argument is contrary to a substantial body of both legislative history and caselaw confirming that Congress's 1966 enactment of FOIA was a complete overhaul of former Section 3.

It is true that where Congress chooses to "copy" the "same" or "verbatim" language in a new statute Congress intends to incorporate previous judicial interpretations of the copied language. *See, e.g., Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich*, 130 S. Ct. 1605, 1616 (2010) (Congress "copied verbatim" the pertinent portions of one statute into another). But here Congress did not copy Section 3 into the 1966 enactment of FOIA. In a clearly stated intent to reverse the expansive interpretation of the prior Section 3, Congress wrote an entirely new statute and made significant word changes to those APA sections that carried over into FOIA.

As this Court recognized in *Rose*, the "principal source for the bill ultimately enacted as [FOIA] was S 1666, 88th Cong., 1st Sess. (1963)." 425 U S. at 375, n 14; *see also*, S Rep. No. 813, 89th Cong., 1st Sess. at 4 (1965) ("S. Rep. No. 89-813"). S 1666, titled "A Bill to Clarify and Protect the Right of the Public to Information," was premised on the recognition that significant change to Section 3 was necessary *See* 109 Cong. Rec. 19,530 (1963) (Statement of Sen. Ervin). *See also*, *Freedom of Information: Hearings on S. 1666 Before the Subcomm. on Admin. Practice and Procedure of the Senate Judiciary Comm* , 88th Cong., 1st Sess at 35-37 (Sen Ervin); *id.*, at 48-49 (Sen. Metcalf) (1963) ("*1963 Senate Hearings*").

As this Court discussed in *EPA v. Mink,* 410 U.S 73, 79-80 (1973), FOIA was adopted as a replacement for Section 3, which was "generally recognized as falling far short of its disclosure goal and came to be looked upon more as a withholding statute than a disclosure statute." 410 U S at 79 (citing S Rep. No 89-813 at 5; H.R. Rep. No. 1497, 89th Cong., 2d Sess at 5-6 (1966) ("H.R. Rep No 89-1497"). *See also* S Rep. No. 1219, 88th Cong., 2d Sess. at 9-11 (1964) ("S Rep. No. 88-1219").[2]

More than just general dissatisfaction with the entire Section 3 of the APA, Congress also recognized the need to tighten specific exemptions. In *Rose*, the Court recognized that Exemption 2 was "traceable to congressional dissatisfaction" with the former Section 3 exemption for "any matter related solely to the internal management of an agency." 425 U.S. at 362 (citing 5 U.S.C. § 1002 (1964)). As the Court explained, "the sweep of that wording led to withholding by agencies from disclosure of matter 'rang(ing) from the important to the insignificant '" 425 U S at 362 (citing S. Rep. No. 89-813 at 5). The Court concluded that "legislative history plainly evidences the congressional conclusion that the wording of Exemption 2, 'internal personnel rules and practices' was to have a narrower reach than the

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[2] As the Senate Report for S. 1666 explained, the intent of S. 1666 was to replace Section 3 of the APA in its entirety due to its failure to achieve public disclosure S Rep No 88-1219 at 9

[APA's] exemption for 'internal management' matters." 425 U.S. at 363.

The Navy's assertion that Congress intended the same "broad understanding" of the old "internal management" exemption to carry over into Exemption 2's exemption for matters "related solely to the internal personnel rules and practices of an agency" flies in the face of FOIA's statutory history as recognized in *Rose*. Resp. Br. at 26. Congress did not simply copy Section 3's "internal management" exemption into FOIA Exemption 2 was not meant to reinstate the "internal management" section of the APA, it was meant to replace it.

C. Legislative History Does Not Support High 2

The Navy cites three "key issues" that it erroneously claims demonstrate Congressional intent that Exemption 2 extends beyond its plain language. Resp. Br. at 30-40.

1. First, there is no legislative history supporting the Navy's assertion that Congressional intent changed when the wording for the precursor to Exemption 2 was changed from "internal *employment* rules and practices" to "internal *personnel* rules and practices." Resp. Br. at 30-34 To the contrary, the change from "employment" to "personnel" was nothing more than a change from one synonym to another

According to the 1964 Senate Report, the amendment that changed "employment" to "personnel" – Amendment 9 – involved simply "redrafting of the three exceptions which are to govern subsection (b) in order that the exceptions in the various subsections have some uniformity of order." S Rep. No. 88-1219 at 5. In the original version of S. 1666, the exemption for internal employment matters applied only to subsection 3(b) which required publication of agency opinions, orders, and rules in the federal register. Subsection 3(c), which addressed other agency records, did not include an exemption for either employment or personnel documents. The amendments reported out of committee as S. 1666 added the "internal personnel rules and practices" (Exemption 2) as well as five additional exemptions to Subsection 3(c) S Rep. No. 88-1219 at 6 (Amendment 16), and 13-14 (describing Subsection 3(c)). The change of the word "employment" to "personnel" occurred during the "renumber[ing]" and "rephras[ing]" of the exceptions. *Id.* The Committee provided no explanation for the changed word. Contrary to the Navy's argument that the change reflected a rejection of the common understanding of "personnel rules and practices" as meaning trivial employment matters, Resp. Br. at 30, the Committee confirmed that the exemption applied only to such trivial matters:

> Certain rules, interpretations, and statements of policy may not affect the public For example, rules as to personnel's use of parking facilities or regulation of lunch hours, statements of

> policy as to sick leave, and the like may be adopted by an agency and not be required to be published in the Federal Register.

S. Rep. No. 88-1219 at 5

The Navy's reliance on the 1963 testimony of Assistant Attorney General Schlei as support for any significance in the change from "employment" to "personnel" is also misplaced. Resp. Br. at 31-32. Indeed, Schlei himself recognized the two words as interchangeable. Schlei testified that with respect to "agency instructions to its investigators as to the means to be employed to detect violation," "the bill would permit withholding of internal agency instructions to its staff only to the extent that they relate 'solely to the internal employment rules and practices of any agency'" *1963 Senate Hearings* 201-202.[3]

In fact Schlei repeated the same concern with the term "personnel" during his 1965 House testimony as he had in his 1963 testimony when the bill used the word "employment." Schlei confirmed his understanding that "personnel" referred to "employee relations, employment management rules and practices of any agency" *Federal Public Records Law: Hearings on H R. 5012 Before a Subcomm of*

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[3] This was but one of Schlei's nine criticism of S 1666 *1963 Senate Hearings* 194-203 It was clear that Schlei was swimming against the tide of Congress's determination to overhaul disclosure law in FOIA. Schlei was satisfied with, and opposed to amending, Section 3 *Id* , 205

the House Comm. On Gov't Operations, 89th Cong., 1st Sess. Pt. 1 at 29-30 (1965) ("*1965 House Hearings*"); Pet. Br. at 27-28. Thus, the very individual on whose testimony the Navy so heavily relies for its argument that the two words have different meanings instead recognized that "employment" and "personnel" were synonyms.

Finally, the Navy argues that Senator Long's statement that "Congress, wouldn't want to do anything that would seriously hurt the law-enforcement provision of any agency" supports the proposition that the change from "employment" to "personnel" has significance Resp. Br. at 32, *quoting 1963 Senate Hearings* at 166.[4] But Senator Long's statement was made in response to testimony from FTC Chairman Dixon, concerning the FTC's law enforcement and investigative functions and his concern over the premature release of private complaints and investigative files. *1963 Senate Hearings* 161-166 Dixon did not mention either "employment rules and practices" or "personnel rules and practices." *Id.* Further, true to Senator Long's word, the Senate did address Dixon's concerns over the law enforcement provisions of agencies by creating Exemption 7. *See* S. Rep. No. 88-1219 at 14, 17.

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[4] By referencing Senator Long's statement after its reference to Mr. Schlei's concern, Resp. Br at 32, the Navy implies that Senator Long's comment was in response to Mr. Schlei. To the contrary, Senator Long's statement was made the day before Mr Schlei testified

2 The Navy's second "key lesson" from the drafting history – that the House legislative history "repeatedly emphasized" that Exemption 2 "applies when disclosure would risk circumvention of the very agency functions to which the records relate" – fails for at least two reasons Resp. Br. 30, 33-38.

a. First, the legislative history does not demonstrate "repeated" emphasis Despite its lengthy and sometimes confusing description of the legislative history, the Navy points to only three actual points of evidence. (1) the colloquy between Representative Moss and Mr. Schlei during the 1965 House hearings, (2) a citation to a portion of this colloquy in the 1966 House Report; and (3) a brief statement from a single House member during open floor debate.

Petitioner has already demonstrated that the dialogue between Representative Moss and Mr. Schlei is helpful to the Navy's argument. Pet. Br. at 27-29. Schlei, who remained generally hostile to the creation of FOIA,[5] confirmed his opinion that use of the term "personnel" connoted "employee relations, employment management rules and practices of an agency." *1965 House Hearings* 29-30 Congressman Moss recognized further work would be needed if the language was to cover the type of investigative materials Schlei wanted to have exempt.[6] But FOIA was enacted without the additional work required to support the outcome desired by either Schlei or the Navy.

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[5] Contrary to Congress's intent of sharply limiting agency discretion, Mr Schlei summed up his 1965 testimony by stating that H R 5012, 89th Cong , 1st Sess (1965), "can result in a valid enactment only if it leaves undisturbed the inherent authority of the executive branch to govern the disclosure or nondisclosure of its records." *1965 House Hearings* at 7

The second line of "evidence" pointed to by the Navy is the House Report. H.R. Rep. No 89-1497. As discussed by this Court in *Rose*, 425 U.S at 363, Pet. Br at 22-23 and fn. 7, and Public Citizen Amici Br. at 8-14, the House Report should not be relied on as legislative history for Exemption 2. Senate Bill S. 1160, 89th Cong., 1st Sess. (1965), passed the Senate based on the language in the Senate Report which was faithful to the plain words of the bill, and in particular Exemption 2. S. 1160 then went to the House where it passed without amendment. The House Report with its contradictory interpretation for Exemption 2 was written *after* the Senate's passage of S. 1160 Because S. 1160 then passed the House without amendment, the Senate was never afforded the opportunity to consider or debate the "intent" added by the House. Davis, K., Administrative Law Treatise, § 3A.31 (1970 Supp) at 174-76 ("statements in the House committee report that contradict the bill and depart from the understanding of the Senate committee are not the law, and ... a clear abuse."); Davis, K., Administrative Law Treatise, § 5.30 (2d ed

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[6] Schlei specifically raised concerns over "Manuals of procedure that are handed to an examiner – a bank examiner, or a savings and loan examiner, or the guidelines given to an FBI agent." *1965 House Hearings* at 29-30.

1978)("[T]he House Committee tried to change the meaning of the legislative language").

While the House Report states that Exemption 2 applies to "[o]perating rules, guidelines and manuals of procedure for Government investigators or examiners ... ," the report references only the dialogue between Congressman Moss and Mr. Schlei. *Id* at 10, *citing 1965 House Hearings,* at 29-30. But as demonstrated in Petitioner's Brief, the Moss-Schlei colloquy supports the conclusion that additional work was needed on Exemption 2's language if it was to apply to the broad range of topics addressed in the House Report.[7] Pet. Br. at 27-29.

The Navy relies finally on a comment by a single member of Congress during the 1966 House floor debates on S 1160. Resp. Br. at 37, *citing* 112 Cong. Rec. 13,659 (1966). While Representative Gallagher did state (in one sentence) that he believed "[i]ncome tax auditors' manuals would be protected under [Exemption] No. 2," he provided no background or support for that observation. This Court has repeatedly eschewed reliance on passing statements of one member made from the floor *Garcia v U.S.*, 469 U S. 70, 76 (1984)

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[7] The Navy's repeated assertion, Resp Br. 39-40, that the House Report's description of Exemption 2 is consistent with the Senate's earlier Senate Report because the Senate changed the word "employment" to "personnel" and because the Senate intended to make Exemption 2 consistent with the old internal agency management exemption in the APA's Section 3 fails for the reasons discussed above *Supra* at 5-11

Thus, all the Navy has are three slender and unconvincing points -- one colloquy with Representative Moss that ends with Representative Moss agreeing that the language would need to be changed in order to have the effect sought by Mr. Schlei; the 1966 House Report which courts and commentators have discounted as not authoritative; and a stray comment from one member during a floor debate. These three points fall far short of supporting the Navy's claim that the "House of Representatives repeatedly emphasized that Exemption 2 applies when disclosure would risk circumvention of the very agency functions to which the records relate." Resp. Br at 30.

b. Even if the Navy were correct that the Representative Moss-Schlei colloquy, the House Report, and statement of Representative Gallagher did indicate intent beyond the plain language of Exemption 2, these three points would demonstrate only an intent to exempt from release manuals of law enforcement investigators, such as FBI manuals, IRS audit manuals and manuals for bank or savings and loan inspectors None of the history cited by the Navy supports its broad request that this Court extend Exemption 2 to all documents – including those not used by investigators or inspectors – that an agency believes might result in the circumvention of agency regulations

3 The Navy asserts that nothing in the 1965 Senate Report's "carefully worded sentence" contradicts the "otherwise uniform understanding that Exemption 2 applies when disclosure would risk

circumvention of the very governmental function addressed in the agency records." Resp Br at 31[8] To the contrary, there is no support that the Senate's "carefully worded sentence" is anything other than a carefully worded description of what the Senate believed it was adopting in S. 1160. Nor is there support for the Navy's proposition that there was a "uniform understanding" that Exemption 2 applied to more than employment relations rules and practices.

In asserting a "uniform understanding" the Navy's historical analysis ignores that the Senate kept the same language and intent for Exemption 2 through both its 1963 bill and the final 1965 bill. As discussed above, the Senate's 1964 Report on S. 1666 stated in unambiguous terms that the intent of the section allowing an exemption from publishing matters "related solely to internal personnel policies and practices" was to exempt "rules as to personnel's use of parking facilities or regulation of lunch hours, statements of policy as to sick leave, and the like" S. Rep. No. 88-1219 at 5. There is no evidence that the Senate considered, before passing S 1666, any other examples of "personnel rules and practices."

Senator Long reintroduced FOIA in 1965 as S. 1160. 111 Cong. Rec. 2,780 (1965). While the location of the FOIA exemptions moved,[9] the 1965 version of S 1160 carried precisely the same language for what became Exemption 2 as contained in the 1963 bill S. 1666. 111 Cong. Rec. 26,821 (1965) (§ 3(e)(2)). Similarly, the 1965 Senate Report contained the identical statement of intent for the "personnel rules and practices" exemption as that used by the Senate in 1964. According to the 1965 Senate Report "Exemption No. 2 relates only to internal personnel rules and practices of an agency." "Examples of these may be rules as to personnel's use of parking facilities or regulation of lunch hours, statements of policy as to sick leave, and the like." S. Rep. No. 89-813 at 8.

---

[8] According to the Senate Report: "Exemption No. 2 relates only to the internal personnel rules and practices of an agency. Examples of these may be rules as to personnel's use of parking facilities or regulation of lunch hours, statements of policy as to sick leave and the like" S Rep No. 89-813 at 8

Contrary to the Navy's assertion, there is no evidence that the Senate ever considered, much less adopted, a different meaning for Exemption 2 prior to the full Senate's passage of S. 1160 on October 13, 1965. 111 Cong. Rec. 27,055 (1965).[10] Indeed, the examples of trivial employee relations matters identified in the Senate's 1965 Senate Report are the same as those in its 1964 Report.

The Navy's argument that the examples provided in the Senate Report are not exhaustive and could include internal manuals unrelated to employee relations is also unsupported. Resp. Br. at 40. The Senate Report specifically limited the type of "personnel matter" to matters such as "personnel's use of parking facilities or regulation of lunch hours, statements of policy as to sick leave, *and the like*." S. Rep No. 89-813 at 8 (emphasis added) The term "and the like" rebuts the Navy's unsupported notion of an open-ended list. There is no basis to depart conceptually from or expand the type of examples provided. *See Samantar v. Yousuf*, 130 S Ct. 2278, 2287 (2010) *citing Russell Motor Car Co. v. U.S.*, 261 U.S. 514, 519 (1923) ("[A] word may be known by the company it keeps").

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[9] The 1965 version of S. 1160 relocated the exemptions that had been previously scattered between subsections 3(a), 3(b) and 3(c) into a new subsection, 3(e) specifically titled "exemptions."

[10] The Navy *incorrectly* implies both through the *order* of its discussion, Resp. Br. at 34-36, and in its text, that the 1966 House Report was issued *before* the 1965 Senate Report or the Senate's 1965 passage of S. 1160.

There is no evidence the Senate ever considered that Exemption 2 might apply even to investigative manuals or procedures, much less the broad range of materials unrelated to enforcement or agency investigations urged here by the Navy.

D. The Concerns Addressed by the 1966 House Report and Policy Concerns that Informed *Crooker* Were Resolved by Congress in Its 1986 Amendment Adding to Exemption 7(E)

As demonstrated in Petitioner's Brief, the specific concern in *Crooker* – release of law enforcement manuals that instructed federal investigators how to conduct their investigations – was addressed and specifically resolved by Congress's 1986 addition of Exemption 7(E). 5 U.S.C. § 552(b)(7)(E). Pet. Br at 35 Despite Congress's failure to extend *Crooker's* holding into Exemption 2 and create a new exemption for non-law enforcement or investigative materials, the Navy encourages this Court do so instead. Resp Br. 42-47. The Court should decline for at least three reasons.

1. First, Congress's decision to amend one subsection of FOIA to explicitly cover some records does not create an implication that Congress intended another section to impliedly cover the same or even a broader category of records. The Navy's reliance on *FDA v. Brown & Williamson Tobacco Corp*, 529 U.S. 120, 143 (2000) is misplaced. Resp. Br at 43. While this Court confirmed in *Brown & Williamson* that "implications of a statute may be altered by the implications of a later statute," it confirmed also that "[t]his is particularly so where the scope of the earlier statute is broad but the subsequent statutes more specifically address the topic at hand" 529 U.S. at 143 (internal quotes omitted).

Here Exemption 2 is narrowly limited to "matters related solely to personnel rules and practices of an agency" – matters that were trivial, of no public interest, and therefore too burdensome to produce After judicial interpretation expanded the narrow language to cover non-employment related materials of significant public interest, such as manuals for investigators, Congress acted to specifically incorporate those materials into a different new FOIA exemption. Thus, the far stronger implication is that Congress meant precisely what it said in both the original Exemption 2 and the new

Exemption 7(E). Exemption 2 is limited to trivial employment related matters and Exemption 7(E) applies to investigative manuals, policies and files. If Congress was satisfied with *Crooker's* creation of a High 2 exemption, it would not have had any need to enact Exemption 7(E) to protect against the disclosure of the law enforcement manuals protected by the High 2 judicial expansion of the statute

2. Second, the addition of subsection (E) to Exemption 7 demonstrates Congress's commitment that FOIA exemptions be construed narrowly and limited to their plain language. As explained in Petitioner's Brief, while in 1983 Congress initially proposed amending both Exemptions 2 and 7 in response to *Crooker,* upon reintroduction in 1986 during the 99th Congress, the proposed amendment to Exemption 2 was not included Pet. Br. at 33-35. Instead, Congress elected to amend only Exemption 7 in order to address "some confusion created by" *Jordan* as well as be "guided by the 'circumvention of the law' standard from *Crooker.*" 132 Cong Rec 29,620 (1986) (Statement of Rep. Kindness). Thus, Exemption 7(E) was added to exempt from disclosure "techniques and procedures" or "guidelines" for law enforcement investigations or prosecutions "if such disclosure could reasonably be expected to risk circumvention of the law." 5 U.S.C § 552(b)(7)(E).

By amending only Exemption 7 to add subsection (E), Congress cleanly consolidated the various exemptions for law enforcement or investigatory reports and procedures under one exemption, thereby eliminating "the need for courts to choose between assisting criminals and distorting the meaning of the second exemption." Davis, K., Pierce, R., Administrative Law Treatise, § 5.8 (1994).

3. Third, Congress's 1986 decision to respond to *Jordan* and *Crooker* by adding subsection 7(E) and not amending Exemption 2 is consistent with the original legislative history. As discussed above, even if the House Report written after the Senate voted on the bill is accepted, the only argument that can be gleaned from the House history was a concern over the protection of "instructions to FBI agents and bank examiners;" "[o]perating rules, guidelines, and manuals of procedure for Government investigators or examiners)," and "income tax auditors' manual[s]" *See, 1965 House Hearings* 30 (Statement of Rep. Moss); H R. Rep. No 89-1497 at 10 and fn 14, and 112 Cong Rec. 13,659 (1966) (statement of Rep. Gallagher). *Supra* at 12-15. By adding Exemption 7(E) to include such investigative instructions, manuals, policies and procedures, the 1986 Congress addressed the concerns of the earlier House Report. Trivial "personnel" or employment related matters are exempt under Exemption 2, and investigative files, and investigative manuals, guidelines, policies, and instructions are exempt under Exemption 7

E. Congress Struck a Balance in FOIA and Mandated Full Agency Disclosure Unless the Information Sought Falls Within One of the Narrow Exemptions

The Navy takes issue with Petitioner's invocation of FOIA's presumption of disclosure and argues instead that the Court should strike a "workable balance" between public disclosure and an agency's claimed need for secrecy. Resp. Br. 48-51. The Navy ignores that it is Congress that struck the balance in FOIA.[11] "The Act's broad provisions favoring disclosure, coupled with the specific exemptions, reveal and present the 'balance' Congress has struck." *John Doe Agency v John Doe Corp.*, 493 U.S. 146, 152-153 (1989).[12] The Navy, by selectively quoting and adding emphasis to words taken out of context from *Rose*, attempts to insert both judicial and agency discretion in expanding FOIA's exemptions beyond the narrow exemptions created by Congress. *Compare* Resp. Br. at 49-50 *with Rose*, 425 U.S. at 360-362. This Court has made abundantly clear that the "limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act" and that the "exemptions are explicitly made exclusive ... and must be narrowly construed." 425 U.S. at 361, *quoting EPA v. Mink*, 410 U.S. at 79 (1973).

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[11] The Navy quotes *CIA v. Sims*, 471 U S 159, 166-67 (1985), for the proposition that "public disclosure is not always in the public interest " Resp Br at 49 The Navy's quotation, however, leaves out the important remainder of the sentence from *Sims.* In full, the Court explained "Congress recognized, however, that public disclosure is not always in the public interest *and thus provided that agency records may be withheld from disclosure under any of the nine exemptions defined in 5 U S C. § 552(b)."* (Emphasis added) The full sentence confirms that while Congress recognized that some documents should be withheld, it was Congress that struck the balance and created the nine narrow exemptions

[12] The "workable balance" discussed by the Court in *John Doe* was limited clearly to the Court looking to the "reasons for the exemption from the disclosure requirements in determining whether the Government has properly invoked a particular exemption " 493 U S at 157

While refusing to accept that the exemptions must be narrowly construed in favor of disclosure, the Navy argues that an exemption for trivial and routine employee relations matters that are of no public interest does not fit Congress's scheme. Resp. Br. at 51. But this argument ignores that this is precisely what Congress did. Indeed, as this Court recognized in *Rose*, "the general thrust of [Exemption 2] is simply to relieve agencies of the burden of assembling and maintaining for public inspection matter in which the public could not reasonably be expected to have an interest." 425 U.S. at 369. *See also* S. Rep. No. 88-1219 at 5 (confirming that the precursor to Exemption 2 in § 3(b)(2) of S. 1666 applied to trivial internal personnel matters such as use of parking facilities, lunch hours, sick leave and the like); S. Rep. No. 89-813 at 8. Congress was not solely focused on matters of national security or federal investigations. It was focused also, through Exemption 2, on eliminating the unnecessary burden of compiling and producing trivial matters of little or no public interest.

The heart of the Navy's policy discussion is its assertion that Exemption 2 should be construed as a broad catchall exemption that grants agency discretion because "[n]one of FOIA's other exemptions address Exemption 2's rationale for withholding the internal rules and procedures for agency personnel."[13] Resp. Br. at 53. Consequently, the Navy seeks discretion to apply Exemption 2 "*generally* whenever the government can establish a significant risk" of circumvention. *Id.* at 53 (emphasis in original) The Navy seeks this discretionary catchall based on its belief that existing exemptions might be too narrow, and enacting new exemptions pursuant to Exemption 3 would be too burdensome on Congress. *Id.* at 52-54. But that is not how Congress constructed FOIA nor how this Court has interpreted it. Congress elected to retain the authority to exempt specific materials pursuant to Exemption 3 Rather than relieve Congress of the supposed burden of enacting new statutory exemptions, the Navy seeks to usurp Congressional power and replace it with agency discretion.

Indeed, the broad agency discretion urged now by the Navy is no different than the complaint of

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[13] In making this assertion the Navy changes Exemption 2's plain language from "internal personnel rules and practices of an agency" to its preferred, but unsupported, "internal rules and procedures for agency personnel " *Supra* at 3-4

Assistant Attorney General Schlei that House Bill H.R. 5012 would "leave nothing" to executive discretion[14] – a plea that was rejected when Congress approved the identical Senate Bill S. 1160 without major amendment in 1966. Congress removed agency discretion when it replaced Section 3 of the APA with FOIA If, as the Navy appears to concede, the ESQD data and maps sought by Milner do not fit within Exemption 2 without the judicially legislated High 2 expansion that cannot be sustained under a proper reading of the Act, they must be released.

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[14] As Mr. Schlei testified

> The bill would reserve to the President authority to classify as "secret" information in two designated areas – national defense and foreign policy However, even in those two areas, the bill seeks to prohibit non-disclosure except as the President, by Executive order identifies the matters which he has determined must be kept secret and specifically requires that they be withheld. Otherwise, however, H R 5012 attempts to leave nothing to Executive discretion.
>
> I respectfully submit, Mr Chairman, that this approach is impossible and can only be fatal to this committee's undertaking . .

1965 House Hearings at 5

CONCLUSION

The Court should confirm that FOIA Exemption 2 is limited solely to minor or routine internal employment matters of no public interest The Court should reverse the Ninth Circuit.

Respectfully submitted,

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BRIEF

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In the
Supreme Court of the United States

GLEN SCOTT MILNER,
Petitioner,

v

UNITED STATES DEPARTMENT OF THE NAVY,
Respondent

On Writ of Certiorari
To the United States Court of Appeals
for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF ALLIED DAILY NEWSPAPERS OF WASHINGTON and SOCIETY OF ENVIRONMENTAL JOURNALISTS IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTERESTS OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 2

I. Expanding application must stop..... 2

II Identity must not matter 8

CONCLUSION 10

TABLE OF AUTHORITIES

Page

Cases

Crooker v. Bureau of Alcohol, Tobacco & Firearms, 670 F.2d 1051 (1981) 5

Department of the Air Force v. Rose, 425 U.S. 352 (1976) 2, 8

Dept. of Defense v. Federal Labor Relations Authority, 510 U.S. 487 (1994) 8

FBI v. Abramson, 456 U.S. 615 (1982) 8, 9

Maricopa Audubon Society v. United States Forest Service, 108 F.3d 1082 (9th Cir. 1997) 8

Milner v. United States Navy, 575 F.3d 959 (9th Cir. 2009) 7, 9

Vaughn v. Rosen, 523 F.2d 1136 (D.C. Cir. 1975) 2

Statutes

5 U.S.C. § 552(a)(3)(A) 7

5 U.S.C. § 552(b)(2) . . . . *passim*

Other Sources

http://www.dhs.gov/xlibrary/assets/foia/privacy_rpt_foia_2009.pdf 3

http://www.dol.gov/sol/foia/data/2009 6

http://www.dol.gov/sol/foia/2009anrpt.htm 6

http://www.hhs.gov/foia/reports/08anlrpt.html 6

http://www.hhs.gov/foia/reports/2009report/2009pdf/09anlrprt_pdf_main.pdf 6

http://www.justice.gov/oip/04_6.html 4, 5

http://www.usdoj.gov/oip/04_6.html 3

http://www.usps.com/foia/_pdf/09foiarp.pdf 5

INTERESTS OF *AMICI*[1]

Allied Daily Newspapers of Washington is a trade association representing 25 daily newspapers across the state of Washington. It advocates for public access to government records so that newspapers can effectively fulfill their role as public watchdogs.

The Society of Environmental Journalists (SEJ) is an international organization with more than 1,400 members dedicated to advancing public understanding of environmental issues by improving the quality and visibility of environmental affairs reporting. Members work in a variety of mediums including television, radio and print, and regularly request government records as part of their news reporting.

SUMMARY OF ARGUMENT

Agencies routinely rely on 5 USC 552(b)(2) ("Exemption 2") to conceal important information of public interest, although the exemption is expressly limited to "matters related solely to the internal personnel rules and practices of an agency." The Navy's refusal in this case to disclose a potentially lethal risk to the community from its Indian Island, Wash., bomb storage is part of a trend, documented in annual agency reports, of ever-expanding application of Exemption 2 beyond internal personnel concerns The annual reports highlight the need to limit Exemption 2 to only those truly trivial personnel records encompassed by its plain language If agencies continue to deny tens of thousands of records requests each year based on an unwarranted judicial expansion of Exemption 2, Congress's goal of a fully informed citizenry will remain unmet.

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[1] *Amici* file this brief with the written consent of the parties. No counsel for a party authored this brief in whole or in part and only the *amici curiae* named on the cover contributed to funding its preparation.

ARGUMENT

I Expanding application must stop

Exemption 2 of the Freedom of Information Act (FOIA) protects from public disclosure only those "matters that are...related solely to the internal personnel rules and practices of an agency." 5 USC 552(b)(2) As this Court explained, "the general thrust of the exemption is simply to relieve agencies of the burden of assembling and maintaining for public inspection matter in which the public could not reasonably be expected to have an interest" *Department of the Air Force v. Rose*, 425 U S 352, 370 (1976) The "line sought to be drawn" by Exemption 2 "is one between minor or trivial matters and those more substantial matters which might be the subject of legitimate public interest" *Vaughn v Rosen*, 523 F 2d 1136, 1142 (D C. Cir. 1975), quoted with approval in *Rose* at 365

The language of Exemption 2 has never changed. Yet in recent years federal agencies have increased their withholdings under Exemption 2, reflecting a bureaucratic shift to greater secrecy. The upsurge is evident from annual FOIA reports describing how many FOIA requests were denied, based on each of FOIA's nine exemptions, each year from 1998 to 2009. To illustrate burgeoning use of Exemption 2 in the past decade, *Amici* developed the following chart from some of the FOIA reports posted at http://www.usdoj.gov/oip/04_6.html:

No. of Exemption 2 denials:	1999	2009
Dept. of Agriculture	60	112
Health & Human Services	32	111
Housing and Urban Dev't	19	48
Dept. of Interior	16	116
Dept. of Labor	402	834
Dept. of State	18	111
Dept. of Transportation	59	111
Treasury (including IRS)	16	209

While all of the major departments have increased denials under Exemption 2, theirs are dwarfed by those of the Department of Homeland Security, which skyrocketed last year.[2]

2004	23,162
2005	33,700
2006	36,676
2007	48,529
2008	42,766
2009	70,544

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[2] See http://www.usdoj.gov/oip/04_6.html and page 7, http://www.dhs.gov/xlibrary/assets/foia/privacy_rpt_foia_2009.pdf

That's more than 455,000 citizen requests blocked by just one department's notion of what's "solely" an internal personnel matter. Put another way, on nearly a half-million different occasions when citizens sought information about the department with major responsibility for our nation's security, including such essential programs as the Coast Guard, Customs and Border Protection, Transportation Security Administration, and the Federal Emergency Management Agency, Exemption 2 was used to hide the information

The Department of Defense, which includes Navy, Army and Air Force operations with enormous impacts on public safety, the environment, and the federal budget, also routinely rejects thousands of citizens' records requests each year based on Exemption 2[3] Its annual Exemption 2 withholdings have more than doubled, from roughly 1,200 in 2000 and 2001 to roughly 2,600 in the last two years *Id*

The agencies charged with protecting the public from harm increasingly conceal information as "internal personnel" matters The Environmental Protection Agency (EPA), for example, rejected only 10 requests under Exemption 2 during the entire 3-year period from 1998 to 2000, but since 2004 it has invoked the exemption an average of 42 times a year.[4] This trend makes it harder for the public to evaluate EPA efforts to prevent and clean up pollution.

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[3] See Department of Defense reports at http //www justice gov/oip/04_6 html

Courts have contributed to the gap between Exemption 2's narrow language and its broad application by agencies. Most notably, *Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051, 1074 (1981), has operated as judicial license for agencies to withhold documents that are "predominantly internal" if their disclosure "significantly risks circumvention of agency regulations or statutes." The *Crooker* reading of Exemption 2 is known as "high 2." Highlighting how agencies routinely use "high 2" to conceal matters well beyond internal personnel rules, the Postal Service stated in its 2009 FOIA report[5]:

> The Postal Service's substantial infrastructure and coordination with both private industry and other government agencies requires the generation of schedules, maps, routes, manuals, and plans that could be used to circumvent a variety of legal requirements, including anti-terrorism laws. The Postal Service routinely protects these records under high 2 when necessary.

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[4] See EPA reports at http://www.justice.gov/oip/04_6.html

[5] See page 3, http://www.usps.com/foia/_pdf/09foiarp.pdf

Of course, anything involving coordination with private industry or other agencies is *not* "related solely to the internal personnel rules and practices of an agency." 5 USC 552(b)(2) And schedules and routes for mail delivery are certainly matters that affect the public and, indeed, are openly carried out each day. This is a stark example of administrative application varying dramatically from the plain meaning of Exemption 2

Concealing records about operations directly affecting the public, as if they are solely "internal personnel" matters, appears to be all too common. For example, the Occupational Safety and Health Administration, charged with protecting worker safety, denied 569 FOIA requests last year and 533 in 2008 under Exemption 2[6] The Centers for Disease Control and Prevention reported 64 Exemption 2 denials last year and 40 the year before[7] It is unlikely that these programs, whose work is critical to public health and safety, could have withheld so many requested records from the public if Exemption 2 was applied only to trivial matters of no public interest.

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[6] See http //www dol gov/sol/foia/data/2009/, Disposition of FOIA Requests – Number of Times Exemptions Applied, http //www dol gov/sol/foia/2009anrpt htm

[7] See http //www hhs gov/foia/reports/08anlrpt html and http //www hhs gov/foia/reports/2009report/2009pdf/09anlrprt_pdf_main pdf, p 14

These and other FOIA statistics are troubling in light of the life-or-death importance of assessing the effectiveness of government safety programs – such as the Navy maps at issue here The 1944 munitions explosion at the Port Chicago Naval Magazine on Mare Island, which killed 320 people and caused damage 48 miles away, is proof that a similar accident at the Indian Island depot could destroy life and property in the surrounding communities. Citizens should know if tax dollars devoted to their health and safety are actually protecting them The 455,000 withholdings by the Homeland Security Department since 2004, and other agencies' increased reliance on Exemption 2, highlight the need to restore the restraint envisioned by Congress The statistics show that, as applied, Exemption 2 acts as a significant barrier to fulfilling FOIA's purpose of facilitating enlightened government by the people

The Ninth Circuit decision in this case broadens even more the judicially created "high 2" exemption. In *Milner v U S Dept of the Navy*, 575 F 3d 959, 970 (9th Cir 2009), the Ninth Circuit held that an agency can withhold records based on a risk of "circumvention of agency regulation" even if the agency is not acting as a regulator regarding the records in question The explosive-hazard maps at issue do not regulate any member of the public, but reveal the extent to which the lives of nearby residents and boaters are threatened by the Navy's loading and storage of bombs and munitions at Indian Island *Id* at 978 (Fletcher, J , dissenting), J App 58 Exempting such records is wildly at odds with this Court's reading of Exemption 2 in *Rose* as shielding trivial records "in which the public could not reasonably be expected to have an interest." 425 U.S. at 370 Possible death and destruction in Port Hadlock and Port Townsend, Wash., is not a trivial concern, nor solely an internal matter for only federal workers to worry about.

In sum, agencies increasingly conceal records of public interest based on a FOIA exemption designed to protect only truly internal personnel matters. In light of this dangerous trend and the well-reasoned arguments of Petitioner Glen Milner, this Court should reverse the Ninth Circuit and eliminate "high 2," or at least rein it in.

II Identity must not matter.

FOIA requires agencies to make records promptly available, upon request, "to *any* person." 5 USC 552(a)(3)(A) (italics added). This provision has been interpreted to "give any member of the public as much right to disclosure as one with a special interest." *Maricopa Audubon Society v United States Forest Service*, 108 F.3d 1082, 1089 (9th Cir 1997), quoting *Dept. of Defense v Federal Labor Rel'ns Auth.*, 510 U.S. 487, 495-97 (1994). Except in cases of privilege, "the identity of the requesting party has no bearing on the merits of his or her FOIA request." *Id.* (internal citations omitted) As *Maricopa* said:

> We note once again that FOIA is 'a scheme of categorical exclusion' that

> does not permit 'a judicial weighing of the benefits and evils of disclosure on a case-by-case basis'

Id, quoting *FBI v. Abramson*, 456 U S 615, 631 (1982)

Here, the Ninth Circuit's decision conflicts with this rule against releasing records selectively Commander George Whitbred IV stated in a declaration in this case that the maps requested by Mr Milner are provided to civilian members of the public on a "case-by-case basis "[8] In fact, the Navy gave an explosive safety map for Indian Island to the Port Townsend, Wash , newspaper, which published it on the front page, and the Navy also shared the withheld records with local officials. J App 52, 59. The Ninth Circuit found this selective release was lawful, in conflict with this Court's admonition that exemptions are categorical and not to be applied selectively. *Abramson,* 456 U.S at 631[9] Thus, reversal is warranted.

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[8] *Milner*, 575 F 3d at 974 (dissent)

[9] *Milner*, 575 F 3d at 968

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Court reverse the decision below.

Dated this 7th day of September, 2010.

Respectfully submitted,

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IN THE

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GLEN SCOTT MILNER,

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DEPARTMENT OF THE NAVY,

Respondent.

On Writ of Certiorari to the
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BRIEF OF PUBLIC CITIZEN, THE AMERICAN CIVIL LIBERTIES UNION, THE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON, CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, THE ELECTRONIC FRONTIER FOUNDATION, THE NATIONAL SECURITY ARCHIVE, AND OPENTHEGOVERNMENT.ORG AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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807

QUESTION PRESENTED

FOIA Exemption 2 applies to records "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2). Does this exemption cover records that do not relate solely to internal employment matters if they are "predominantly internal" and their disclosure "would present a risk of circumvention of agency regulation"?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

BACKGROUND 1

SUMMARY OF ARGUMENT 4

ARGUMENT 4

I. There is No High 2 Exemption 6

II. If There Were a High 2 Exemption, It Would Be Limited to Procedural Manuals and Guidelines Whose Release Would Allow the Subjects of Regulation to Evade That Regulation 18

III. The Court of Appeals' Construction of Exemption 2 Undermines FOIA's Structure and Threatens Government Transparency 23

CONCLUSION 27

APPENDIX:

Description of Individual *Amici Curiae* 1a

TABLE OF AUTHORITIES

CASES

Connecticut National Bank v. Germain,
503 U.S. 249 (1992) 8

Crooker v. Bureau of Alcohol, Tobacco & Firearms,
670 F.2d 1051 (D.C. Cir. 1981) . . . . *passim*

Department of Air Force v. Rose,
425 U.S. 352 (1976) . . . . *passim*

Department of Interior v. Klamath Water Users Protective Association, 532 U.S. 1 (2001) 18

Dodd v. United States,
545 U.S. 353 (2005) 7

EPA v. Mink,
410 U.S. 73 (1973) 4, 5

Exxon Mobil Corp. v. Allapattah Services, Inc.,
545 U.S. 546 (2005) 12

Hardy v. Bureau of Alcohol, Tobacco & Firearms,
631 F.2d 653 (9th Cir. 1980) 9

Hawkes v. IRS,
467 F.2d 787 (6th Cir. 1972) 7, 10, 12

Jordan v. United States Department of Justice,
591 F.2d 753 (D.C. Cir. 1978) 7, 10

Leocal v. Ashcroft,
543 U.S. 1 (2004) 7

NLRB v Robbins Tire & Rubber Co.,
437 U.S. 214 (1978). 26

TRW Inc v Andrews,
534 U.S. 19 (2001). 17

United States Department of Justice v Tax Analysts,
492 U.S. 136 (1989). 18

United States v Gonzales,
520 U.S. 1 (1997) 8

Vaughn v. Rosen,
523 F.2d 1136 (D.C. Cir. 1975). 6, 11

STATUTES, LAWS, AND LEGISLATIVE HISTORY

5 U.S.C. § 1002 (1964). 5

112 Cong. Rec. 13641(1966) 14, 21

Federal Public Records Law (Part 1): Hearings Before Subcommittee of the Committee on Government Operations on H.R. 5012 et al.,
89th Cong. (1965). 13, 21

Freedom of Information, Executive Privilege, Secrecy in Government: Hearings on S. 1142 et al. Before Subcommittees on Administrative Practice and Procedure and Separation of Powers of the Senate

Committee on the Judiciary, and Before Subcommittee on Intergovernmental Relations of the Senate Committee on Government Operations, 93d Cong (1974). 11, 12

Freedom of Information Act
- 5 U.S.C. § 552(b)(1). 14, 15, 25
- 5 U.S.C. § 552(b)(2) . . . . *passim*
- 5 U.S.C. § 552(b)(3). 25
- 5 U.S.C. § 552(b)(7). 15, 24
- 5 U.S.C. § 552(b)(7)(E). 16
- 5 U.S.C. § 552(d). 5

Freedom of Information Act Amendments, Pub. L. No. 93-502, 88 Stat. 1561 (1974). 16

Freedom of Information Reform Act, Pub. L. No. 99-570, § 1802, 100 Stat. 3207 (1986) . . 16

H.R. Rep. No. 1497, 89th Cong., 2d Sess. (1966). . . 9, 20

S. Rep. No. 221, 98th Cong., 1st Sess. (1983) . . . 16, 17

S. Rep. No. 813, 89th Cong., 1st Sess. (1965). . . . 9, 10, 18

OTHER AUTHORITIES

Coalition of Journalists for Open Government, *Still Waiting After all These Years* (2007), available at http://www.cjog.net/documents/Still_Waiting_Narrative_and_Charts.pdf. 24, 25

Kenneth Culp Davis, *Administrative Law Treatise* (2d ed. 1978). 9, 12

Memorandum from Laura L.S. Kimberly, Information Security Oversight Office, et al., attached to Memorandum from Andrew H. Card, Jr., Chief of Staff, to the Heads of Executive Departments and Agencies (Mar. 19, 2002), available at http://csrc.nist.gov/drivers/documents/guidance-homelandsec.html. 24

Merriam-Webster's Collegiate Dictionary (11th ed. 2009). 20

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are organizations that support government transparency, rely on the Freedom of Information Act (FOIA) to receive records necessary for their work, and have significant expertise in how FOIA works in practice. *Amici* have noticed that, in recent years, agencies have increasingly relied on FOIA Exemption 2 to withhold records that are not related to personnel issues. *Amici* are concerned that the court of appeals' broad construction of Exemption 2 will increase the amount of information the government withholds under FOIA, undermining government transparency and the benefits to democracy that accompany it. *Amici* also fear that the court of appeals' decision will encourage agencies and lower courts to broadly construe other FOIA exemptions, hindering citizens' ability to hold their government accountable. *Amici* are more fully described in the attached appendix.

BACKGROUND

This FOIA case concerns requests for data showing the distances at which explosions at Naval Magazine Indian Island in Puget Sound, Washington, would be felt. Glen Milner, a resident of the region, filed the requests to determine whether he and his neighbors would be at risk in the event of such an explosion. Although the withheld records contain mathematical formulas and arc maps, not personnel rules or employee practices, the Ninth Circuit concluded that they were exempt under FOIA Exemption 2, which applies to records "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2)

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[1] No counsel for a party authored this brief in whole or in part, and no counsel for a party or party made a monetary contribution intended to fund the preparation or submission of this brief No person or entity other than *amici curiae* made any monetary contribution to this brief's preparation or submission. The parties have consented to the filing of this brief, and letters of consent are being submitted concurrently

The Ninth Circuit held that Exemption 2 encompasses two entirely distinct exceptions to FOIA's disclosure mandate: a "Low 2" Exemption that applies to the mundane employment matters that are described in the statutory text and a "High 2" Exemption that applies when a "personnel document" is "predominantly internal and its disclosure presents a risk of circumvention of agency regulation." Pet. App. 32, 39-40. According to the Ninth Circuit, the High 2 Exemption was derived from *Department of Air Force v Rose*, 425 U S. 352 (1976), in which this Court left open the question whether Exemption 2 applies "where disclosure may risk circumvention of agency regulation." Pet. App. 32 (quoting *Rose*, 425 U.S. at 369). The Ninth Circuit also indicated that its particular formulation of the High 2 test was adopted from *Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051, 1074-75 (D.C. Cir. 1981) (en banc), in which, in considering whether Exemption 2 applied to portions of an ATF manual, the D C. Circuit held that the exemption applies to "predominantly internal" records whose release would "significantly risk[] circumvention of agency regulations or statutes." Pet. App 34, 39.

The Ninth Circuit concluded that the withheld records were sufficiently personnel-related because they were referenced in an agency manual as an item that personnel should consult and because they were used by personnel in doing the jobs that were the subject of the manual. *Id.* at 40. The Ninth Circuit also concluded that the data were "predominantly internal"—and thus met the statutory requirement of being "solely" internal—"regardless of prior limited disclosure" outside of the Navy. *Id.* at 41. Finally, the Ninth Circuit determined that release of the data would risk circumvention of the law by protestors or terrorists who wanted to interfere with Navy activities. *Id* at 45. Accordingly, it held the records exempt under the High 2 Exemption

Judge William Fletcher dissented Although he agreed that the Ninth Circuit should adopt *Crooker*'s High 2 test, he "strongly disagree[d]" with the majority's application of the "circumvention of agency regulation" prong of that test. Pet App. 55. "Circumvention of agency regulation has a precise, and restricted, meaning," he explained *Id.* "[U]nder *Crooker*, agency documents embodying 'personnel rules and practices' are exempt under Exemption 2 only when they are 'procedural manuals and guidelines used by the agency in discharging its regulatory function,' and only when their disclosure 'to the subjects of regulation' might result in the 'circumvention of agency regulations.'" *Id.* at 56 (quoting *Crooker*, 670 F.2d at 1066 (quoting *Rose*, 425 U.S at 364)). Because the withheld records were not procedural manuals or guidelines whose disclosure would result in circumvention of agency regulations by the subjects of regulation, Judge Fletcher would have held that they were not exempt from disclosure. *Id.* at 60.

SUMMARY OF ARGUMENT

FOIA Exemption 2 exempts from mandatory disclosure agency records that are "related solely to the internal personnel rules and practices of an agency" 5 U.S.C. § 552(b)(2). Below, however, the Ninth Circuit held that a "High 2" exemption applied to materials that are not solely "internal," "personnel"-related, or related to "rules and practices."

The court of appeals' interpretation of Exemption 2 cannot be reconciled with the exemption's text, legislative history, structure, or purpose. It flies in the face of this Court's direction that FOIA exemptions be narrowly construed And it risks turning the exemption into a catch-all used whenever an agency deems records "sensitive" but cannot find an applicable exemption under which to withhold them. This Court should make clear that there is no High 2 Exemption, and that Exemption 2 is limited to records pertaining solely to "routine" employment matters "with merely internal significance." *Rose*, 425 U.S. at 369.

ARGUMENT

FOIA was enacted in 1966 to amend the public disclosure section of the Administrative Procedure Act (APA), which had been "generally recognized as falling far short of its disclosure goals" *EPA v Mink*, 410 U.S. 73, 79 (1973). To "permit access to official information long shielded unnecessarily from public view," FOIA replaced the "vague phrases" in the APA with nine specific exemptions. *Id.* at 79, 80 Congress explicitly made the exemptions exclusive, providing that nothing in the Act should be read to "authorize withholding of information or limit the availability of records to the public, except as specifically stated." 5 U.S.C. § 552(d).

FOIA's nine exemptions were "plainly intended to set up concrete, workable standards for determining whether particular material may be withheld or must be disclosed." *Mink*, 410 U.S. at 79. Each FOIA exemption applies to a defined category of records. FOIA's exemptions are meant to be "narrowly construed," and "do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Rose*, 425 U.S. at 361.

The specific category of records covered by Exemption 2 is limited to records that are "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2) This language stemmed from "congressional dissatisfaction" with the sweeping language of the exemption in the public disclosure section of the APA for "'any matter relating solely to the internal management of an agency'" *Rose*, 425 U.S at 362 (quoting 5 U.S.C. § 1002 (1964)). As this Court has explained, "the wording of Exemption 2, 'internal personnel rules and practices,' was to have a narrower reach than the Administrative Procedure Act's exemption for 'internal management,' matters." *Id.*

"[T]he general thrust of [Exemption 2] is simply to relieve agencies of the burden of assembling and maintaining for public inspection matter in which the public could not reasonably be expected to have an interest" *Id* at 369-70 But the decision below adopts a far broader standard, purporting to apply the exemption to "predominantly internal" materials whose release "may risk circumvention of the law," under a so-called "High 2"

Exemption. Pet. App. 47. Traditional tools of statutory construction, however, demonstrate that there is no High 2 Exemption. And even if there were, it would be limited to procedural manuals and guidelines the release of which would allow the subjects of regulation to circumvent that regulation.

I. There is No High 2 Exemption.

FOIA's plain language, legislative history, structure, and purpose all demonstrate that there is no High 2 Exemption. Exemption 2 covers only internal employment matters in which it can be presumed that the public has no interest

1. Exemption 2 exempts matters "related solely to the internal personnel rules and practices of an agency." 5 U S C § 552(b)(2). These words do not encompass "predominantly internal records" whose disclosure "would present a risk of circumvention of agency regulation." Pet. App. 34.

First, the "predominant internality" standard finds no support in the text, which states that records must relate "solely," not "predominantly," to internal personnel rules and practices to be withheld under Exemption 2. 5 U.S.C. § 552(b)(2). In adopting the "predominantly internal" standard, the Ninth Circuit relied on *Crooker*, in which the D.C Circuit concluded that because "'relating' is potentially all-encompassing while 'solely' is potentially all-excluding" and it was "unlikely that Congress intended either extreme," "solely" should be "given the construction" of "predominantly." 670 F.2d at 1056 (quoting *Vaughn v. Rosen*, 523 F.2d 1136, 1150-51 (D.C. Cir. 1975) (Leventhal, J., concurring)). But there is no contradiction between the words "related" and "solely." Rather, "solely" modifies "related," explaining what the withheld matters must relate to in order to be exempt: They must relate solely, i.e., exclusively, to internal personnel rules and procedures. In deciding that records need only to be "predominantly" internal, the D.C. Circuit did not "construe" the word "solely"; it stripped the word of its plain meaning. Courts, however, "are not free to rewrite the statute that Congress has enacted." *Dodd v. United States*, 545 U S. 353, 359 (2005) They "must give words their 'ordinary or natural' meaning." *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004) (citation omitted). And "solely" means exclusively, not predominantly.

Likewise, the "risks circumvention of agency regulation" standard is nowhere to be found in the text of Exemption 2 Rather, the exemption refers to "internal personnel rules and practices." 5 U.S C. § 552(b)(2). The word "personnel" connotes relationship to "the selection, placement, and training of employees and . . . the formulation of policies, procedures, and relations with employees or their representatives." *Websters Third New Int'l Dictionary* 1687 (1965). Thus, internal personnel rules and practices "would normally connote matters relating to pay, pensions, vacations, hours of work, lunch hours, parking, etc " *Jordan v U S Dep't of Justice*, 591 F.2d 753, 763 (D.C. Cir. 1978) (en banc), *overruled by Crooker*, 670 F.2d 1051. "The statute's emphasis on personnel rules and practices suggests concern with conditions of employment and the like," *Hawkes v IRS*, 467 F.2d 787, 797 (6th Cir. 1972), not with risk of circumvention of the law.

In its brief in opposition to the petition for certiorari (at 16-17), Respondent Department of the Navy contended that "the limitations in Exemption 2" come not from the words "personnel rules and practices" but "instead from other words and phrases in the statute, such as 'internal' and '[r]elated solely to'" (which, again, it interprets to require matters to be only "predominantly" internal, not "solely" internal). In other words, the Navy claimed that four of the eight words in the exemption—"personnel rules and practices"—are not meant to be limiting, and one—"solely"—should not be given its normal meaning. However, courts "must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v Germain*, 503 U S 249, 253-54 (1992). Based on its text, Exemption 2 should be limited to records relating solely to rules and practices concerning wholly-internal employment issues.

2 Instead of being grounded in Exemption 2's plain language, the High 2 Exemption purports to be derived from legislative history. Where the language of a statute is clear, however, "there is no reason to resort to legislative history." *United States v. Gonzales*, 520 U S. 1, 6 (1997). In any event, even the legislative history of FOIA counsels against interpreting Exemption 2 to include a High 2 Exemption.

Advocates of the High 2 Exemption rely on the 1966 House Report on FOIA, which states:

> Matters related solely to the internal personnel rules and practices of any agency: Operating rules, guidelines, and manuals of procedure for Government investigators or

> examiners would be exempt from disclosure, but this exemption would not cover all "matters of internal management" such as employee relations and working conditions and routine administrative procedures which are withheld under the present law

H.R. Rep. No. 1497, 89th Cong., 2d Sess 10 (1966). Courts that have adopted a High 2 Exemption have relied on the House Report's reference to "manuals of procedure for Government investigators or examiners." *See, e.g., Crooker*, 670 F.2d at 1060; *Hardy v. Bureau of Alcohol, Tobacco & Firearms*, 631 F.2d 653, 656 (9th Cir. 1980).

Even if the plain language were open to interpretation, however, the House Report cannot be read as an interpretation of Exemption 2's text. *See* 1 Kenneth Culp Davis, Administrative Law Treatise § 5:30 (2d ed. 1978) ("[T]he House committee tried to change the meaning of the legislative language."). The Report states that the exemption covers records nowhere mentioned in the text (operating rules, guidelines, and manuals for investigators), while excluding other records (those relating to employee relations, working conditions, and routine administrative procedures) that fit within the statutory language.

In contrast to the House Report, the Senate Report indicates that the exemption applies only to trivial rules and practices relating to personnel issues. That report states:

> Exemption No. 2 relates only to the personnel rules and practices of an agency. Examples of these may be rules as to personnel's use of

> parking facilities or regulation of lunch hours, statements of policy as to sick leave, and the like.

S. Rep. No. 813, 89th Cong., 1st Sess. 8 (1965). In other words, the Senate and House Reports disagree on whether the exemption would apply to materials concerning employee relations and working conditions, or whether it encompasses procedural manuals, which have become the quintessential High 2 material. *See, e.g.*, *Rose*, 425 U.S. at 363 ("The House and Senate Reports on the bill finally enacted differ upon the scope of the narrowed exemption."); *Hawkes*, 467 F.2d at 796 ("The disagreement between the houses is total.").[2] This disagreement makes resort to legislative history to expand the statute beyond its plain language particularly inappropriate.

Moreover, in *Rose*, this Court's only previous case concerning Exemption 2, the Court relied on the Senate Report's interpretation of Exemption 2, rather than on the

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[2] In *Crooker*, the D.C. Circuit stated that the House Report's statement that Exemption 2 applies to manuals of procedure "is uncontroverted by the Senate Report" and thus that the reports do not disagree about whether such manuals are exempt under Exemption 2. 670 F.2d at 1061 & n.27. But the reason the Senate provided examples was to explain the type of records covered by the exemption. Accordingly, the report indicates that types of records that are *not* similar to use of parking facilities, regulation of lunch hours, and the like—such as manuals of procedure—are *not* covered by the exemption. Indeed, the D.C. Circuit had earlier stated that the reports were "[d]iametrically opposite," *Jordan*, 591 F.2d at 767, and that the "Senate Report interprets Exemption 2 as exempting only trivial 'housekeeping' matters in which it can be presumed the public lacks any substantial interest." *Id.*

House Report's. 425 U.S. at 367. The Court quoted extensively from *Vaughn v. Rosen*, 523 F.3d at 1142, in which Judge Wilkey explained that the D.C. Circuit was relying on the Senate Report for two primary reasons. First, Judge Wilkey wrote, "'Congress intended that Exemption 2 be interpreted narrowly and specifically,'" yet "'the House Report carries the potential of exempting a wide swath of information.'" *Rose*, 425 U.S. at 365 (quoting *Vaughn*, 523 F.3d at 1142). And second, the Senate Report was before both houses of Congress when they passed FOIA, but the House Report post-dated the Senate's vote on the bill and thus was only before the House. As Judge Wilkey explained, by changing the interpretation of Exemption 2 without amending the text, "'the House denied both the Senate Committee and the entire Senate an opportunity to object (or concur) to the interpretation written into the House Report (or voiced in floor colloquy).'" *Id.* at 366 (quoting *Vaughn*, 523 F.3d at 1142-43).[3]

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[3] Judge Wilkey further explained that there was "evidence to indicate that the House Committee considering the bill felt under some pressure to expand some of the exemptions," including Exemption 2, "to secure the bill against a threatened veto." *Vaughn*, 523 F.2d at 1142. "Since the House sponsors were unwilling or unable to narrow the exemptions on the House floor by amending the Senate Bill, they attempted instead to achieve their result indirectly through the Committee Report." *Id.*, *see* Freedom of Information, Executive Privilege, Secrecy in Government: Hearings on S. 1142 et al. Before Subcomms. on Admin. Practice & Procedure and Separation of Powers of the S. Comm. on the Judiciary, and Before Subcomm. on Intergovernmental Relations of the S. Comm. on Gov't Operations,

(continued...)

"For the reasons stated by Judge Wilkey," (and because it thought the House Report's focus was on circumvention of agency regulation, which was not an issue in *Rose*), the Court chose to rely on the Senate Report. 425 U.S. at 366-67. For those same reasons, and to provide a consistent approach to Exemption 2, the Court should consider the Senate Report the better interpretation of Exemption 2 here as well.

Other legislative history also supports a narrow construction of Exemption 2. In *Crooker*, the D.C. Circuit

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[8](continued)

93d Cong 122 (1974) (statement of Benny Kass, Attorney at Law) (statement of former counsel to House committee explaining that the reason "the House report is different" was because "we tried to compromise a number of the specific objections into the House report" under "an implied threat" of veto), 1 Kenneth Culp Davis, Administrative Law Treatise § 5.3 (2d ed 1978) ("After the Senate committee had made its report and after the Senate had passed the bill, the House committee yielded to pressures to restrict the disclosure requirements, but instead of changing the bill it wrote the restrictions into the committee report, often contradicting the words of the bill and sometimes contradicting both those words and the Senate report "), *see also Hawkes*, 467 F.2d at 797 ("[T]he Senate interpretation was before the House when it voted to approve subsection (b)(2) in exactly the same form as had passed the Senate earlier To adopt the statutory interpretation put forward in the House Report would be to allow a single house of the Congress to effectively alter the meaning placed on proposed legislation by the other house without altering a word of the text "), *cf Exxon Mobil Corp v Allapattah Servs , Inc* , 545 U S 546, 570 (2005) ("One need not subscribe to the wholesale condemnation of legislative history to refuse to give any effect to such a deliberate effort to amend a statute through a committee report ") relied on an exchange between Representative John E. Moss, the principal sponsor of FOIA, and Assistant Attorney General Norbert Schlei to state that "the House hearings unequivocally reveal that Exemption 2 was intended to cover investigatory materials." 670 F.2d at 1059. However, although that exchange shows that Representative Moss *wanted* investigatory materials covered, it does not show that he believed that they, in fact, *were* covered by Exemption 2. When Representative Moss expressed his intent that Exemption 2 cover investigatory materials, Mr. Schlei explained that, to do so, "the word 'personnel' should be stricken" because it connotes "employee relations, employment management rules and practices of an agency." Federal Public Records Law (Part 1): Hearings Before Subcomm. of the Comm. on Gov't Operations on H.R. 5012 et al., 89th Cong. 29-30 (1965). Representative Moss responded that "[w]e will hope to seek a way of doing the job" without exempting too much in the process *Id.* Thus, the full exchange demonstrates that, in the end, Representative Moss agreed that the exemption would need to be amended if he wanted it to cover investigative materials. No such amendment was ever made.

Other testimony at congressional hearings also expressed the opinion that certain procedural manuals *should* be exempt, but that they were not in fact covered by the language of Exemption 2 *See Crooker*, 670 F.2d at 1102-04 (Wilkey, J., dissenting) (quoting testimony). That members of Congress or government agency representatives expressed a desire for investigative manuals to be exempt from disclosure does not demonstrate that Congress thought it was enacting language that would, in fact, exempt such records from release To the contrary, the legislative history indicates that Representative Moss, at least, probably knew that Exemption 2 would not cover such records.[4]

3. The structure of FOIA's exemptions also demonstrates that Exemption 2 should be interpreted according to its plain language. Agencies invoke national security and law enforcement when they claim the High 2 Exemption, but FOIA *already has* exemptions intended to address national security and law-enforcement concerns: Exemption 1 applies to matters that are "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy" and that "are in fact properly classified

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[4] *Crooker* also stated that "supporters of [FOIA] were not challenged in their claim that government investigatory manuals were protected under Exemption 2," 670 F 2d at 1061, but it cited only one statement by a member of Congress making such a claim —a statement by Representative Gallagher that "[i]ncome tax auditors' manual would be protected under No 2 " *Id* (quoting 112 Cong Rec 13641, 13659 (1966) (remarks of Rep Gallagher)) The other statements referred to by *Crooker* were simply general statements that FOIA involved a balance between the public's right to know and the government's need to keep certain information confidential *See, e g , id* (quoting 112 Cong Rec at 13655 (remarks of Rep Dole)) (quoting Rep Dole stating that "the bill takes into consideration the right to know of every citizen while affording the safeguards necessary to the effective functioning of Government") That Congress believed FOIA, overall, involved a balance of different concerns does not shed light on what concerns Exemption 2 was intended to address

pursuant to such Executive order." 5 U.S.C. § 552(b)(1). And Exemption 7 applies to "records or information compiled for law enforcement purposes" to the extent they meet one of six criteria, such as if they "could reasonably be expected to interfere with enforcement proceedings," or "would deprive a person of a right to a fair trial or an impartial adjudication." *Id.* § 552(b)(7).

Below, the court of appeals relied on Exemptions 1 and 7 to adopt a broad interpretation of Exemption 2, noting that Exemptions 1 and 7 cover a lot of predominantly internal information that could be used to circumvent the law, and concluding that Congress, therefore, must have intended for *all* internal information that could be used to circumvent the law to be exempt. "It would be incongruent if FOIA protected sensitive information when it is contained in a classified or law enforcement document," the Ninth Circuit stated, "but not when it is contained in a document developed predominantly for use by agency personnel." Pet. App. 36. But instead of indicating that Congress intended all predominantly internal records whose release could risk circumvention of the law to be exempt, Congress's decision to address only a subset of such records indicates just the contrary: It wanted only the precise records it specified to be exempt from disclosure.

Rather than furthering the goals of Exemptions 1 and 7, a broad construction of Exemption 2 undermines those exemptions by allowing agencies to circumvent their limits. Congress has amended both Exemptions 1 and 7 over the years to prevent abuse Exemption 1, for example, originally applied to all records that were "specifically required by Executive order to be kept secret in the interests of the national defense or foreign policy," but was amended in 1974 to apply only if the records were properly classified *See* Freedom of Information Act Amendments, Pub L No. 93-502, § 2(A), 88 Stat. 1561 (1974). It would undermine this careful limitation on the national security exemption if, rather than having to show that a record met the strict criteria for classification, an agency only had to demonstrate that the record was mostly internal and might somehow be of use to someone who wanted to harm national security As the dissent below explained, "[t]he majority's determination to expand Exemption 2 to protect information that the Navy has not seen fit to classify distorts Congress's careful balance." Pet. App. 64. Similarly, it would evade the limitations on Exemption 7 if agencies could withhold records for law enforcement reasons just by showing they were mostly internal and somehow risked aiding someone who wanted to break a law.

Exemption 7(E), in particular, indicates that there is no High 2 exemption. That exemption applies to law enforcement records whose release "would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law." 5 U.S.C. § 552(b)(7)(E). Below, the Ninth Circuit noted that the Senate committee report for S. 774 in the 98th Congress, part of which was passed by the 99th Congress as the Freedom of Information Reform Act, Pub. L. No. 99-570, § 1802, 100 Stat. 3207 (1986), which enacted Exemption 7(E)'s current language, stated that the exemption was "guided" by *Crooker*. S. Rep No. 221, 98th Cong., 1st Sess. 25 (1983) (quoted by Pet. App. 27) The Ninth Circuit concluded, therefore, that "Congress has impliedly approved of *Crooker's* approach." Pet. App. 37. But if Congress had agreed with *Crooker's* interpretation of Exemption 2, there would have been no need for Exemption 7(E). "Guidelines for law enforcement investigations or prosecutions" whose "disclosure could reasonably be expected to risk circumvention of the law" would *already* have been exempt under Exemption 2. And if such records were exempt under Exemption 2, then the language exempting those records in Exemption 7(E) would be superfluous. It is "a cardinal principle of statutory construction," however, "that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc v Andrews*, 534 U.S. 19, 31 (2001) (internal quotation marks omitted).

Thus, rather than indicating that Congress approved of *Crooker's* interpretation of Exemption 2, the 1986 amendments demonstrate that Congress believed that a subset of the records that would be encompassed in a High 2 Exemption should be exempt, but were not already. And it chose to exempt those records through Exemption 7(E) instead of Exemption 2. Indeed, although the Senate Committee Report cited by the decision below also proposed amending Exemption 2 to specifically cover "manuals and instructions to investigatory, inspectors, auditors, or negotiators, to the extent that disclosure of such manuals and instructions could reasonably be expected to jeopardize investigations, inspections, audits, or negotiations," S. Rep. No. 221, at 44-45, Congress did not do so. Given that Congress specified in Exemption 7 which mostly internal records whose release would risk circumvention of the law it wants to be exempt, this Court should not interpret Exemption 2 to cover all such records.

4. Finally, a broad interpretation of Exemption 2 undermines the basic thrust of FOIA, which is to promote "'a general philosophy of full agency disclosure.'" *Rose*, 425 U.S. at 360 (quoting S. Rep. No. 813, at 3). Congress carefully structured and limited FOIA's exemptions so as not to "obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act" *Id.* at 361. The High 2 Exemption, however, is nebulous and potentially far-reaching, requiring only that records be mostly internal and present "a risk" of being helpful to someone intent on evading a regulation or law

Because of the clarity of FOIA's purpose, this Court has emphasized that FOIA's exemptions are to be narrowly construed. *See, e.g*, *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001); *U.S. Dept. of Justice v Tax Analysts*, 492 U.S. 136, 151 (1989), *Rose*, 425 U S. at 361 Here, Exemption 2 should be given its narrow—and natural—interpretation. The Court should hold that Exemption 2 only applies to wholly-internal, employment-related matters.

II. If There Were a High 2 Exemption, It Would Be Limited to Procedural Manuals and Guidelines Whose Release Would Allow the Subjects of Regulation to Evade That Regulation

Even if FOIA included a High 2 Exemption that covered some records whose release risked circumvention of agency regulation, it would not cover the records at issue here. At most, High 2 would be limited to procedural manuals and guidelines whose release would allow the subjects of regulation to evade that regulation.

To begin with, to be exempt under Exemption 2, records must be "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2) If this language applies to any records besides those relating to personnel issues themselves (i.e., if there is a High 2 Exemption at all), it applies only to records instructing personnel on rules and practices that govern them. Thus, in *Crooker*, for example, the D.C. Circuit held that the portions of the ATF manual at issue were within the statutory language because they referred "to investigative techniques, in the form of prescribed rules and practices for agency personnel." *Crooker*, 670 F.2d at 1073.

Although the Ninth Circuit below paid lip service to the statutory language, it interpreted that language in a way that would cover all agency records. According to the Ninth Circuit, the withheld records are within Exemption 2's language because they were *referred to* in a manual for personnel as items personnel should consult and therefore were "one part of the internal policies and procedures that [Navy] personnel are bound to follow." Pet. App. 40. "The [withheld] data is indeed an integral part of the Navy's personnel practices," the court stated, noting that personnel used the data in performing the duties that were the subject of the personnel manual. *Id.* Exemption 2, however, does not apply to all records relied on, used, or referred to by personnel in figuring out how to do their jobs. That an employee uses a record, or is required to consult a record, does not make that record "related solely to . . . internal personnel rules and practices." 5 U.S.C. § 552(b)(2) At best, that a manual intended for agency employees refers to the records demonstrates that they bear a tangential, attenuated relationship to personnel rules and practices. The statute, however, requires that they relate *solely* to such rules and practices. In the High 2 context (if it exists at all), this requirement must mean that the records establish the rules and practices themselves.

Moreover, if the High 2 Exemption exists, it is limited to records whose disclosure risks "circumvention of agency regulation." *Rose*, 425 U.S. at 369. Although the Ninth Circuit stated the requirement that records risk circumvention of regulation to be exempt, it did not apply that standard. To "circumvent" is to "manage to get around especially by ingenuity or stratagem." *Merriam-Webster's Collegiate Dictionary* 225 (11th ed. 2009). In other words, if it exists, the High 2 Exemption is limited to records that would aid someone in evading the law. *See Crooker*, 670 F 2d at 1975 (using "circumvent" and "evade" interchangeably). Here, however, the requested data would not help anyone to "get around" the law.

The legislative history confirms that, if it exists, the High 2 Exemption is far more limited than the Ninth Circuit's application of it. The legislative history relied on by courts that adopt a High 2 Exemption shows only some congressional concern about disclosing investigative manuals that would allow the subjects of investigation to avoid detection The House Report, for example, demonstrates only an intent for the exemption to cover "[o]perating rules, guidelines, and manuals of procedure for Government investigators or examiners." H.R. Rep. No. 1497, at 10. Likewise, the exchange between Representative Moss and Assistant Attorney General

Schlei on which *Crooker* relied shows only that Representative Moss wanted to exempt "manuals of procedure that are handed to an examiner—a bank examiner, or a savings and loan examiner, or the guidelines given to an FBI agent." Federal Public Records Law Hearings, at 29. And the one statement in congressional debate cited by *Crooker* as indicating that Exemption 2 covered more than employment-related issues referred specifically to "income tax auditors' manual[s]." 112 Cong Rec. at 13659.

Similarly, although, as the Ninth Circuit noted, *Rose* left open the question whether Exemption 2 could apply to *some* records "where disclosure may risk circumvention of agency regulation," *Rose*, 425 U.S. at 369, *Rose* did not suggest that the exemption could apply to *all* such records. *Rose* simply noted that although most courts that considered the differences between the House and Senate Reports believed that the Senate Report was a better indicator of congressional intent, a few had relied on the House Report, but "only where necessary to prevent the circumvention of agency regulations that might result from disclosure to the subjects of regulation of the procedural manuals and guidelines used by the agency in discharging its regulatory function " *Id.* at 364. Because the records at issue in *Rose* did not risk circumvention of agency regulation, *Rose* chose not to "consider in this case the applicability of Exemption 2 in such circumstances." *Id.* Thus, *Rose* left open the possibility that Exemption 2 might apply "only where necessary to prevent the circumvention of agency regulations that might result from disclosure to the subjects of regulation of the procedural manuals and guidelines used by the agency in discharging its regulatory function." *Id* [5]

In line with the narrow possibility held out by the Court in *Rose*, *Crooker*, although holding (incorrectly) that "predominantly internal" materials whose "disclosure significantly risks circumvention of agency regulations or statutes" were exempt from disclosure, 670 F.2d at 1074, focused its analysis on investigative manuals whose release would allow people to evade detection For example, in summarizing the legislative history, *Crooker* stated that the House history showed "that Exemption 2 was intended to shield internal instructions to law enforcement agents from mandatory disclosure." *Id.* at 1065. In its discussion of FOIA's structure, it stated that other parts of FOIA "reinforce[d] the conclusion that Congress was aware of the need to protect investigative techniques from disclosure." *Id.* at 1062. And in talking about case law from other circuits, Crooker divided the circuits based on how they exempted "law enforcement investigatory manuals." *Id.* at 1071.

Here, the Ninth Circuit's interpretation of the High 2 Exemption is far broader than any contemplated by FOIA's legislative history, *Crooker*, or *Rose*. The development of the High 2 Exemption has been like a game of telephone, with the desire to protect a small category of records (investigative manuals whose release would risk evasion of the law) leading to the development of a test (whether the records are predominantly internal and would significantly risk circumvention of agency regulation) that courts have then used, out of context, to exempt records that bear no relation to the investigative manuals the test was developed to cover or, for that matter, to the text, legislative history, structure, or purpose of FOIA. If this Court holds that there is a High 2 Exemption, the exemption should be limited to instances in which withholding is "necessary to prevent the circumvention of agency regulations that might result from disclosure to the subjects of regulation of the procedural manuals and guidelines used by the agency in discharging its regulatory function." *Rose*, 425 U.S. at 364.

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[5] In its brief in opposition (at 22), the Department of the Navy contended that "there is no textual basis" for limiting the "circumvention requirement" to the subjects of regulation But given that there is no textual basis for the "circumvention requirement" at all, one cannot expect the limits on that fabricated requirement to be spelled out in the text

III. The Court of Appeals' Construction of Exemption 2 Undermines FOIA's Structure and Threatens Government Transparency.

The decision below has broad implications for government transparency. Under FOIA, it is not the role of either agencies or the courts to determine which records should be exempt from disclosure. Congress has already so determined. Yet the decision below threatens to turn Exemption 2 into a catch-all for information that does not fall within one of FOIA's exemptions, but that agencies or courts think Congress should have exempted.

Indeed, one of the explanations given by the Ninth Circuit for adopting its broad interpretation of Exemption 2 was that it wanted the exemption to cover records that judges thought should be covered based on their "intuitive understanding of congressional intent," but that would not fit within a narrower construction. Pet. App. 38-39. According to the court of appeals, a narrower construction of Exemption 2 caused "district courts to strain the logical limits of 'law enforcement.'" *Id.* at 39. "They regularly deny requests for disclosure of all kinds of internal documents, including those related to the military and national security, even if unrelated to investigations or prosecutions." *Id.* But the answer to district courts "strain[ing]" to apply a test to records to which it is inapplicable should not be to change the test to meet the judge's intuition; it should be to encourage judges to apply the test appropriately and reverse them when they misapply it.

Government agencies increasingly have turned to Exemption 2 to withhold information that they deem sensitive but that does not fall into any of the other exemptions. A memo circulated to the heads of executive departments and agencies by then-White House Chief of Staff Andrew Card on March 19, 2002, specifically mentioned Exemption 2 in encouraging agencies to give full consideration to all FOIA exemptions when processing FOIA requests containing "sensitive but unclassified information." *See* Mem from Laura L.S. Kimberly, Info Sec. Oversight Office, et al., attached to Mem from Andrew H. Card, Jr., Chief of Staff, to the Heads of Executive Dep'ts & Agencies (Mar. 19, 2002), available at http://csrc.nist.gov/drivers/documents/guidance-homelandsec.html. And according to a study by Coalitions of Journalists for Open Government (CJOG) in 2007, while reliance on exemptions overall rose 83% from 1998 to 2006, reliance on Exemption 2 rose 344% during that same time period. *See* CJOG, *Still Waiting After all These Years*

(2007), available at http.//www.cjog.net/documents/Still_Waiting_Narrative_and_Charts.pdf.

In this case, the dissent below found "reason to suspect that the Navy's reluctance to release the [withheld records] is not based on the danger to national security that might be posed if the arc maps were released to Milner and the general public, but rather on the political difficulties that might be created by their release." Pet. App. 62. The lower court's construction of Exemption 2 provides too much leeway for agencies to claim disclosure would lead to circumvention of agency regulation, when their real concern is with the political ramifications of release, not with national security or law enforcement.

Congress took national security, law enforcement, and other concerns into account in drafting FOIA and crafted specific exemptions to address those concerns. If records meet the standards for classification in the applicable executive order, for example, they can be classified and withheld under Exemption 1, 5 U.S.C. § 552(b)(1). As the dissent pointed out below, Exemption 1 is "specifically designed to allow government agencies to withhold information that might jeopardize our national security." Pet. App. 63. Allowing an agency to withhold records that are not properly classified on national security grounds undermines Congress's decision to place limits on Exemption 1

Moreover, FOIA has an exemption designed specifically to accommodate congressional authorization for the withholding of records that do not fit within one of the other exemptions. Exemption 3 applies to records that another statute requires be withheld. 5 U.S.C. § 552(b)(3).

Thus, if Congress has concern about a sensitive record or category of records that is not already exempt under one of FOIA's exemptions, it can enact a statute specifically exempting those records from disclosure. Exemption 3 provides protection in cases in which Congress believes that records that do not fall within one of the other exemptions should be withheld, so that agencies and courts do not have to make that determination.

"The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed " *NLRB v. Robbins Tire & Rubber Co* , 437 U.S. 214, 242 (1978). The Ninth Circuit's broad construction of Exemption 2 threatens to vastly increase the amount of information the government can withhold under FOIA, thereby undermining FOIA's ability to fulfill its goals Exemption 2 applies to records "related solely to the internal personnel rules and practices of an agency." 5 U S C. § 552(b)(2). This Court should hold that the exemption is limited to internal employment issues "in which the public could not reasonably be expected to have an interest." *Rose*, 425 U.S. at 369-70

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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APPENDIX

Description of Individual *Amici Curiae*

Public Citizen is a nonprofit consumer advocacy organization that appears before Congress, administrative agencies, and courts on a wide range of issues, including government transparency. Public Citizen promotes government accountability by requesting agency records to inform the public about government activities, providing advice to people who seek access to information held by government agencies, and litigating to challenge unwarranted assertions of FOIA exemptions.

The **American Civil Liberties Union** (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The ACLU has found FOIA an invaluable tool in protecting civil liberties, and has participated in numerous FOIA cases in this Court and other courts, both as direct counsel and as amicus curiae. The ACLU of Washington is a statewide affiliate of the national ACLU.

Citizens for Responsibility and Ethics in Washington (CREW) is a nonprofit, nonpartisan corporation organized under section 501(c)(3) of the Internal Revenue Code. Through a combined approach of research, advocacy, public education, and litigation, CREW seeks to protect the rights of citizens to be informed about the activities of government officials and to ensure the integrity of those officials. Many of CREW's actions flow from the principles that transparency is a cornerstone of our democracy and that government accountability is achieved through government transparency Toward this end, CREW frequently files FOIA requests to access and make publicly available government documents that reflect on or relate to the integrity of government officials and their actions.

The **Electronic Frontier Foundation** (EFF) is a donor-supported, not-for-profit membership organization that works to inform policymakers and the public about civil liberties issues related to technology, and to act as a defender of those liberties. In support of its mission, EFF frequently uses the FOIA to obtain and disseminate information concerning the activities of federal agencies.

The **National Security Archive** (the Archive) is an independent, nongovernmental research institute and library located at the George Washington University that collects and publishes declassified documents, concerning United States foreign policy and national security matters, obtained through the FOIA. As part of its mission to broaden access to the historical record of the U.S. government, the Archive is a leading user of the FOIA.

OpenTheGovernment.org is a coalition of more than 70 consumer and good government groups, journalists, environmentalists, library groups, labor groups, and others across the political spectrum united to make the federal government a more open place in order to make us safer, strengthen public trust in government, and support our democratic principles.

AMICUS
CURIAE
BRIEF

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IN THE
Supreme Court of the United States

GLEN SCOTT MILNER,

Petitioner,

v.

UNITED STATES DEPARTMENT OF THE NAVY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICI CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND NINETEEN NEWS MEDIA ORGANIZATIONS IN SUPPORT OF PETITIONER

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638

QUESTION PRESENTED

Whether 5 U.S.C. § 552(b)(2), which allows a government agency to keep secret only documents related solely to the internal personnel rules and practices of an agency, must be strictly construed to preclude the "High 2" expansion created by some circuits but rejected by others.

TABLE OF CONTENTS

Question Presented i

Table of Authorities iv

Statement of Interest 1

Summary of Argument 2

Argument 5

I. Federal Agencies' Overbroad Reading of Exemption 2 of the federal Freedom of Information Act Erroneously Adopted by Some Circuits Reduces FOIA to the Withholding Statute it was Specifically Enacted to Replace 5

- A. As originally conceived, FOIA Exemption 2 was intended to protect a limited class of records from disclosure 5
- B. Courts have permitted agencies to erroneously expand Exemption 2 coverage in ways Congress never intended. 9
- C. The Ninth Circuit's decision has twisted Exemption 2 into a statute that now provides unbridled discretion to withhold government information of critical importance to the media and public. 15

TABLE OF CONTENTS (cont.)

II. The Ninth Circuit's expansion of the "High 2" exemption to FOIA will substantially hinder journalists' ability to serve their constitutionally protected "watchdog" function and ensure hazardous materials and critical infrastructure are being properly maintained........ 18

A. Hazardous Chemical Records........ 18

B. Transportation Infrastructure Records 23

C. Nuclear Facility Records........27

D. Biological Agent Records .... .28

Conclusion........ 30

Appendix A: Descriptions of *amici*........A-1

Appendix B: Additional *amici* counsel........ A-8

TABLE OF AUTHORITIES

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Audubon Soc'y v. U.S. Forest Serv., 104 F.3d 1201 (10th Cir. 1997). 14

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Dep't of the Air Force v. Rose, 425 U.S. 352 (1976). 6, 8, 9

Elliot v. Dep't of Agriculture, 596 F.3d 842 (D.C. Cir. 2010). 11

Jordan v. Dep't of Justice, 591 F.2d 753 (D.C. Cir. 1978). 9, 10

Living Rivers, Inc. v. U.S. Bureau of Reclamation, 272 F. Supp.2d 1313 (D. Utah 2003). 14

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STATUTES AND LEGISLATIVE HISTORY

5 U.S.C. § 1002 (1964). 6, 7

Freedom of Information Act

  5 U.S.C. § 552 *et seq*. 2

  5 U.S.C. § 552(b)(2). 1, 6

  5 U.S.C. § 552(b)(7)(F). 14

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TABLE OF AUTHORITIES (cont.)

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COURT RULES

Sup. Ct. R. 37 1

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STATEMENT OF INTEREST[1]

Amici curiae, described fully in Appendix A, are The Reporters Committee for Freedom of the Press and nineteen news media organizations — ALM Media, LLC, the American Society of News Editors, The Associated Press, Bloomberg L.P., Cable News Network, Inc., the Citizen Media Law Project, Dow Jones & Company, Inc., The E.W. Scripps Company, the First Amendment Coalition, the First Amendment Project, the National Press Club, the National Press Photographers Association, Newspaper Association of America, The Newspaper Guild – CWA, NPR, Inc., the Radio Television Digital News Association, The Society of Professional Journalists, Tribune Company and The Washington Post.

This case concerns an issue critical to the public and the media: whether the government may broadly exceed the scope of Exemption 2 of the federal Freedom of Information Act, 5 U.S.C. § 552(b)(2), (hereinafter "Exemption 2") in withholding a wide range of documents. As initially conceived, Exemption 2 was intended to cover documents relating only to trivial internal personnel rules and practices of an agency. However, in application, it has been contorted to such a disturbing extent that agencies consistently cite Exemption 2 to withhold any document that could potentially fall into the "wrong hands" and be used to commit any number of speculative harms. This erroneous expansion of Exemption 2 has led to unchecked discretion on the part of federal agencies in processing requests under the federal Freedom of Information Act, 5. U.S.C. § 552 *et seq.* (hereinafter "FOIA").

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[1] Pursuant to Sup. Ct. R. 37, counsel for *amici curiae* declare that they authored this brief in total with no assistance from the parties; that no individuals or organizations other than *amici* made a monetary contribution to the preparation and submission of this brief; that counsel for all parties were given timely notice of the intent to file this brief; and that written consent of all parties to the filing of the brief *amici curiae* has been duly filed with the Clerk.

As detailed herein, *amici* highlight how the administrative interpretation of Exemption 2 has transformed it back into the failed access law Congress intended it to replace. Further, *amici* highlight how, for the public good, the media and public interest groups utilize public record data regarding the storage and handling of hazardous materials and infrastructure data.

Should this Court uphold the lower court's ruling and give expansive reading to Exemption 2, the media and ultimately the public stand to lose the benefit of assessing the risks and dangers in their communities. Indeed, if the lower court ruling stands, federal agencies will be given wide discretion to withhold virtually any record under any imaginative public safety threat scenario.

SUMMARY OF ARGUMENT

FOIA's broad disclosure requirements were intended to replace the public access provisions of § 3 of the Administrative Procedure Act, 5 U.S.C. §1002 (1964), which imparted such wide discretion in agency officials to withhold documents from the public that it became known more as a withholding statute than one of disclosure. *See* H.R. Rep. No. 89-1497, at 4, 6 (1966) (hereinafter "House Report").

Exemption 2 by its plain language exempts only those materials "related solely to the internal personnel rules and practices of an agency." However, as set forth in more detail below, it has been expanded by agency interpretation and adopted by lower courts to over time cover more than just trivial matters of internal procedure to also include almost any record whose disclosure could enable some unidentified party to commit a hypothetical crime at some undefined future time. Hence, in what has come to be known as the "High 2" exemption, agency officials have again been handed the wide and unchecked discretion they formerly had under 5 U.S.C. §1002 (1964). This power has indeed been seized upon by executive officials who have over the last decade encouraged agencies to use the "High 2" exemption in the broadest ways imaginable.

At the heart of what materials are properly covered under Exemption 2 is the debate over what Congress intended when it passed FOIA. However, even assuming *arguendo* that the more expansive reading given Exemption 2 in the House Report has any weight, the government has expanded the purported "High 2" exemption well beyond its logical limits. Clearly, Exemption 2 cannot be construed in a way that equates it to the very statutory language FOIA was intended to replace and strengthen. Upholding the lower court's ruling will, unfortunately, have such a result.

Additionally, *amici* submit this brief to highlight the critical public value documents such as those at issue in this case have and how they are frequently used by the media and other interested citizen groups to ensure that the hazardous materials and infrastructure in their communities is being properly stored and maintained. *Amici* present numerous examples of how such documents are used in aiding journalists in performing their constitutionally protected watchdog role and how disclosure of such documents often results in safer communities. The public and the media stand to lose access to such vital records if this Court upholds a broad interpretation of Exemption 2.

The creation and expansion of the "High 2" exemption has choked off information of critical public interest. In today's world, the public has an acute interest, as the government obviously does as well, in issues such as terrorism and homeland security that are, unfortunately, an ongoing and important concern. However, singular focus over what the shadow criminal can possibly do with government provided information (assuming such information is even truly necessary or enabling) only serves to deprive the public with the means to adequately assess whether government is in fact taking the proper steps to ensure its safety. As *amici* highlight, it is often only when failures are publicly exposed that they are corrected. Contrary to government assertions, upholding the lower court's ruling, sanctioning the ever expanding "High 2" exemption and keeping the public ignorant of the potential threats that surround them makes us all less safe.

ARGUMENT

I. Federal Agencies' Overbroad Reading of Exemption 2 of the federal Freedom of Information Act Erroneously Adopted by Some Circuits Reduces FOIA to the Withholding Statute it was Specifically Enacted to Replace.

A. As originally conceived, FOIA Exemption 2 was intended to protect a limited class of records from disclosure.

FOIA was enacted to amend and strengthen the weak public disclosure provisions of § 3 of the Administrative Procedure Act, 5 U.S.C. § 1002 (1964)—a law Congress recognized continually failed to provide any meaningful access to federal agency records and often was cited by agencies as a basis to deny records requests. As its legislative history documents:

> Innumerable times it appears that information is withheld only to cover up embarrassing mistakes or irregularities and the withholding justified by such phrases in section 3 of the Administrative Procedure Act as—"requiring secrecy in the public interest," or "required for good cause to be held confidential." S. Rep. No. 89-813, at 3 (1965) (hereinafter "Senate Report").

The same Senate Report goes on to observe further that FOIA's predecessor law only made records "available to persons properly and directly concerned…." *Id.* at 5. Because of such limiting clauses, characterized as a "lack of standards," it was easy for records custodians to withhold documents on virtually any arbitrary basis. *Id.* "It would require almost no effort for any official to think up a reason why a piece of information should be withheld...." *Id.*

The accompanying House Report agreed, finding that the law "has been used as an authority for withholding, rather than disclosing, information" and that "[h]istorically, Government agencies whose mistakes cannot bear public scrutiny have found 'good cause' for secrecy." House Report at 4, 6.

FOIA was enacted to reverse this disturbing situation and "establish a general philosophy of full agency disclosures unless information is exempted under clearly delineated statutory language...." Senate Report at 3. Indeed, as this Court has long held, "[d]isclosure, not secrecy, is the dominant objective of the Act" and FOIA "represents the congressional determination of the types of information that the Executive Branch must have the option to keep confidential, if it so chooses." *Dep't of the Air Force v. Rose*, 425 U.S. 352, 361 (1976) (hereinafter "Rose"). In short, FOIA is designed to impose a heavy burden on the government to justify non-disclosure while also preventing the Executive Branch from exercising whimsical discretion that potentially places politics before law.

To this end, Congress specifically exempted nine classes of information from disclosure under FOIA. Exemption 2 provides that FOIA does not apply to records that are "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2). The language of Exemption 2 is intended to rein in similar but exceedingly broad language found in the former § 3 of the Administrative Procedure Act, which stated that records reflecting "any matter relating solely to the internal management of an agency" need not be disclosed. 5 U.S.C. § 1002

(1964); House Report at 4. This language was used, for example, to justify withholding core FOIA information about government expenditures on employee salaries because of the tenuous link such information had to a matter of internal management. *See* House Report at 6.

As has been frequently observed by a number of courts, the controversy over what materials can be lawfully withheld under Exemption 2 stems largely from the differing descriptions of its intended scope as set forth in the Senate and House Reports, and consequently, which report is controlling.

The Senate Report stated:

> Exemption No. 2 relates only to the internal personnel rules and practices of an agency. Examples of these may be rules as to personnel's use of parking facilities or regulation of lunch hours, statements of policy as to sick leave, and the like. Senate Report at 8.

The House Report, taking a broader view, stated Exemption 2 covers:

> Matters related solely to the internal personnel rules and practices of an agency: Operating rules, guidelines, and manuals of procedure for Government investigators or examiners would be exempt from disclosure, but this exemption would not cover all "matters of internal management" such as employee relations and working conditions and routine administrative procedures which are withheld under the present law. House Report at 10.

As such, the Senate Report has come to be viewed as supporting the "Low 2" exemption reading for trivial internal documents deemed of no interest to the public while the House Report has been offered as support for the purported existence of the "High 2" exemption that claims to cover a much broader sweep of documents.[2]

This Court has never adopted the House Report's view of what is covered under Exemption 2. Rather, in *Rose*—this Court's only prior decision discussing Exemption 2—it relied solely on the Senate Report's narrower view of Exemption 2 noting that at that time virtually all courts "have concluded that the Senate Report more accurately reflects the congressional purpose." *Rose*, 425 U.S. at 363. Leaving open the question of whether a "High 2" exemption even exists, this Court noted that in the few cases where lower courts relied on the House Report, those decisions "have done so only where necessary to prevent the circumvention of agency regulations that might result from disclosure to the subjects of regulation of the procedural manuals and guidelines used by the agency in discharging its regulatory function." *Id.* at 364.

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[2] *Amici* note that whether 5 U.S.C. § 552(b)(2)—considering its plain language, purportedly conflicting legislative history and the additional exemptions found in FOIA—should properly be construed to include a "High 2" exemption lies at the root of the instant controversy. As that issue is more directly addressed by other filings with this Court in this matter it is not given primary treatment here. However, for those additional reasons cited in the papers supporting Petitioner, *amici* agree that a "High 2" statutory construction of Exemption 2 is in clear error and belies both the statute's unambiguous language as well as Congressional intent to narrowly limit Exemption 2 to only those matters commonly now referred to as "Low 2" exemptions.

B. Courts have permitted agencies to erroneously expand Exemption 2 coverage in ways Congress never intended.

To be sure, despite this Court's acknowledgment that the Senate Report represented the majority view, some lower courts, including the U.S. Court of Appeals for the Ninth Circuit in the decision below, have gone wildly astray in applying and expanding the purported "High 2" exemption. It has gone beyond an application to procedural manuals and guidelines in connection with law enforcement, regulatory functions. Furthermore, "High 2" has been extended to apply to third parties at large (sometimes rather selectively) instead of only to those classes of persons subject to agency regulation.

As the brief summary that follows shows, the broad agency reading of Exemption 2's scope has in some circuits clearly returned to the arbitrary and overbroad language found within 5 U.S.C. § 1002 (1964) that FOIA was intended to rectify. Such has occurred despite this Court's finding that FOIA was intended to scale back the scope of the prior version of Exemption 2. The "legislative history plainly evidences...Exemption 2...was to have a narrower reach than the Administrative Procedure Act's exemption for 'internal management' matters." *Rose*, 425 U.S. at 363. Much of the impetus behind this gradual retreat stems from improper agency actions challenged before the U.S. Court of Appeals for the District of Columbia, precedent upon which the Ninth Circuit relied heavily in the present case.

In line with Congressional intent to narrow the class of Exemption 2 documents, the D.C. Circuit initially rejected agencies' notion of a "High 2." *See Jordan v. Dep't of Justice*, 591 F.2d 753, 771 (D.C. Cir.

1978). Just three years later, the D.C. Circuit subsequently reversed course and recognized that ATF surveillance training manuals could be withheld under a "High 2" exemption. *See Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051, 1074-75 (D.C. Cir. 1981). In so holding, the *Crooker* court began to chip away at the intended narrow construction of Exemption 2.

Aside from recognizing "High 2," the *Crooker* court went on to disregard the plain language of the law stating that only "solely" internal matters are exempt, believing the term "solely" to be too restrictive. *See id.* at 1056-57. Instead, the court substituted its own language—holding that matters need only be "predominantly" internal—for Exemption 2 to apply. *See id.* at 1074. Thus was born a rewrite of Exemption 2 where nontrivial agency documents could now be withheld if: (1) they are predominantly internal and (2) significantly risk circumvention of agency regulations or statutes. *See id.* In so doing, the *Crooker* court noted that it was adopting this Court's "language in Rose," language that specifically highlighted that the House Report stated any purported "High 2" exemption was applicable to those individuals subject to agency regulation. *Id.* at 1066, 1074 (*quoting Rose*, 425 U.S. at 364).

The second prong of this "High 2" exemption was further weakened when the D.C. Circuit held that the release of information need not necessarily result in circumvention of a specific statute or regulation in order to gain "High 2" protection. Rather, the second prong of the "High 2" test could be satisfied if disclosure of a document would render it "operationally useless." *See Nat'l Treasury Employees Union v. U.S. Customs Serv.*, 802 F.2d 525, 530-31 (D.C. Cir.

1986); *Schiller v. Nat'l Labor Relations Bd.*, 964 F.2d 1205, 1208 (D.C. Cir. 1992).

Additionally, the D.C. Circuit has held that when an agency in fact grounds its decision to withhold documents on the basis that disclosure would result in circumvention of the law, "[j]udicial willingness to sanction a weak relation to 'rules and practices' may be greatest...." *See Schwaner v. Dep't of the Air Force*, 898 F.2d 793, 796 (D.C. Cir. 1990).

Finally, courts that accept a "High 2" reading have also incredibly extended its reach to documents that are not even directly related to law enforcement purposes. This limitation was of course what was originally contemplated in the broader Exemption 2 language of the House Report when it stated "[o]perating rules, guidelines, and manuals of procedure for Government *investigators* or *examiners*" were exempt from disclosure. House Report at 10 [emphasis added].

For example, in *National Treasury*, the court upheld the refusal to disclose "crediting plan" documents used to evaluate applicant qualifications for agency positions. *Nat'l Treasury*, 802 F.2d at 531. "High 2" has also been used to uphold an agency's refusal to disclose blueprints of an agency building on the speculative grounds that doing so could compromise the security of agency property. *See Elliott v. Dep't of Agriculture*, 596 F.3d 842 (D.C. Cir. 2010).

While any construction of Exemption 2 adopting a "High 2" component is wrong, those courts that have nonetheless done so have stretched its reach beyond any reasonable construction of its purported intent as described in the House Report and by this Court in *Rose*. In this matter, unfortunately, the decision below only serves to further distort "High 2" in direct opposition to FOIA's broad presumption of disclosure and the requirement to narrowly construe its exemptions. *See Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 151 (1989).

The records at issue in this matter are known as Explosive Safety Quantity Distance ("ESQD") data. Such information, displayed either in mathematical formula or arc map display, is used to determine how to safely store ammunition to minimize explosive chain reactions and to estimate the maximum area over which an explosion may reach should such an event occur. *See Milner v. U.S. Dep't of the Navy*, 575 F.3d 959, 962 (9th Cir. 2009); Pet. App. 29. This information is certainly of the utmost public concern given that local residents such as Mr. Milner have a grave interest in knowing what potential impact an explosion would have on the local community and whether the Navy is safely storing ammunition caches.

The Ninth Circuit's decision below seizes upon the D.C. Circuit's ever-expanding view of "High 2" and manages to take it even further. First, the court adopted the predominantly internal reading of "High 2" and found that it applies to more than law enforcement materials. *See id.* at 968; Pet. App. 39-40. Second, as noted in Judge William Fletcher's dissent, the majority has also abandoned precedent under the second prong of the "High 2" test requiring that a circumvention of the law "must be by a person or entity that is subject to regulation by the agency in question." *See id.* at 976; Pet. App. 55.

Instead, the majority applies "High 2" to the hypothetical criminal and citizen-protestor that one day could potentially find ESQD arc map data useful in planning a criminal act or disrupting Navy protocols. *See id.* at 971; Pet. App. 45. As Judge Fletcher correctly observes, the "Navy is not acting as a regulatory or law enforcement agency, and the arc maps do not regulate anyone or anything outside the Navy itself." *Id.* at 978; Pet. App. 58. The logical extension of the majority's expansive view of "High 2" would allow the government to withhold virtually any document for which it can articulate even the most tenuous reason why the information could be used to violate the law or foment some ill-defined turmoil.

Amici, of course, agree that the Navy should be taking steps to adequately safeguard munitions to ensure the security of its personnel and local residents. This is exactly why Mr. Milner — a life-long resident of the Puget Sound area who for some 20 years has been researching, publishing and speaking on the topic of explosive hazards — has such a keen interest in the records. *See id.* at 972; Pet. App. 48. Mr. Milner wants to make sure residents are aware of the dangers posed by the installation and that the Navy is doing everything reasonably possible to minimize any risk. As discussed in Section II, the media has an identical interest, is in fact often instrumental in the security process, and has uncovered gross mishandling and misuse of hazardous materials that would have otherwise likely gone unexposed. The Navy's hypothetical security concerns, and for that matter any government agency making similar claims, are simply not properly addressed through the invocation of "High 2." Indeed, Exemption 2 was never intended to have any reach beyond the trivial matters described in the Senate Report.

In some cases, courts have rightfully recognized the folly of accepting hypothetical concerns that a release of information can play some role in an unwanted outcome as a basis for Exemption 2 protection. The U.S. Court of Appeals for the Tenth Circuit refused to apply a "High 2" exemption to a request for Mexican spotted owl "management territory" maps. *See Audubon Soc'y v. U.S. Forest Serv.*, 104 F.3d 1201, 1204 (10th Cir. 1997). The Forest Service had claimed that disclosure of the maps would make it easier for people to locate and harm the endangered owls. *See id.* at 1203. Prior to its ruling in *Milner*, the Ninth Circuit itself found that maps detailing the nesting sites of northern goshawks were not internal agency documents under Exemption 2 despite claims that revealing the locations jeopardized the birds' safety. *See Maricopa Audubon Soc'y v. U.S. Forest Serv.*, 108 F.3d 1082 (9th Cir. 1997).

Courts have also refused to apply a "High 2" exemption to a request by an environmental group for inundation maps for areas below the Hoover and Glen Canyon Dams. *See Living Rivers, Inc. v. U.S. Bureau of Reclamation*, 272 F. Supp.2d 1313 (D. Utah 2003). The Bureau of Reclamation had claimed that the maps could aid terrorists as they showed how a dam compromise would impact local communities and critical infrastructure. *See id.* at 1315-16. While finding that portions of the maps were properly exempt under FOIA exemption 7(F), 5 U.S.C. § 552(b)(7)(F), the *Living Rivers* court specifically held that the application of a "High 2" exemption to such records was improper. *See id.* at 1317-18, 1322. The *Living Rivers* court recognized that other exemptions within FOIA dealing with law enforcement and national security adequately address government safety concerns for which Exemption 2 is improper.

C. The Ninth Circuit's decision has twisted Exemption 2 into a statute that now provides unbridled discretion to withhold government information of critical importance to the media and public.

With the Ninth Circuit's ruling below, we have alas come full circle. FOIA's legislative history explicitly notes Congress' dissatisfaction with the lack of standards within 5 U.S.C. § 1002 (1964) to prevent agencies from arbitrarily refusing to disclose records or not doing so when it was deemed politically expedient. Loopholes within the law allowing officials to deny records requests when: (1) not in the "public interest;" (2) there was "good cause" to withhold; or (3) a request was made by a person not deemed "properly and directly concerned," opened the door wide for abuse.

The decision below demonstrates clearly that Exemption 2's continuing mutation has reverted it back to all that was deemed unacceptable under 5 U.S.C. § 1002 (1964). The Senate Report noted that under the prior law it would require minimal effort to concoct possible scenarios why a record should be withheld. *See* Senate Report at 5. Exemption 2's expansion under *Milner* to non-law enforcement records and to persons beyond those subject to agency regulation sanctions government articulations of: (1) attenuated chains of events; (2) possible, however improbable, disaster scenarios; and (3) implicit claims that without agency disclosure criminals would otherwise not commit an act or acquire similar information that would aid in its commission.

It also bears mentioning that it is highly questionable whether criminals even need government provided documents to aid them if they are truly intent on committing a crime. Researchers have demonstrated that the deliberate and systematic planning in which sophisticated criminals often engage can be done wholly independent of government provided material using similar information found in the public domain. *See* Joseph D. Jacobson, *Safeguarding National Security Through Public Release of Environmental Information: Moving the Debate to the Next Level*, 9 Envtl. Law. 327 (2003). Indeed, the causal link between disclosure and catastrophe has been greatly exaggerated, all to the detriment of the public's right of access under FOIA.

Without question the Ninth Circuit's reading of Exemption 2 in *Milner* provides massive cover to withhold documents on speculative grounds and invites agencies to do so. This potential power has not gone unexercised. The Department of Justice issued notice in 2001 that agencies should "avail themselves of the full measure" of "High 2" to protect against any potential terrorist harm. U.S. Dep't of Justice, Office of Information and Privacy, *FOIA Post* (Oct. 15, 2001).[3] In a 2002 memorandum to all executive agency and department heads, then White House Chief of Staff Andrew Card specifically encouraged officials to apply Exemption 2 to "sensitive" information. *See* Memorandum from Andrew H. Card, Jr., to The Heads of Executive Dep'ts and Agencies (Mar. 19, 2002) (attaching accompanying Memorandum from Laura L.S. Kimberly, et al. to Departments and Agencies (Mar. 19, 2002)).[4]

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[3] *Available at*: http://www.justice.gov/archive/oip/foiapost/2001 foiapost19.htm.

[4] *Available at*: http://www.dod.gov/pubs/foi/dfoipo/docs/cbrn_wh_memo.pdf.

Further, exactly as under 5 U.S.C. § 1002 (1964), the lower court's reading of Exemption 2 allows government to decide who has a proper interest in a record to justify its release. In *Milner*, first responder third parties were deemed proper parties for disclosure. But potential *"first victims"* of an explosion and a requester with extensive knowledge of explosive hazards who by all appearances seems to have only the safety of the community in mind are refused the same information.

The court below has sanctioned the Navy's decision to decide what parties can receive documents and what parties cannot. One can easily see how such a process allows the government to hide documents under Exemption 2 from those individuals it deems antagonistic (i.e., the media) to their interests. All of this is of course all the more confounding and indicative of improper agency discretion under Exemption 2 considering that Mr. Milner was "properly concerned" enough to obtain ESQD arc maps from the Navy for its Bangor, Washington installation where disclosure apparently was in the public interest. *See Milner* 575 F.3d at 974; Pet. App. 52.

For the reasons cited above, this Court must hold Exemption 2 to be governed by the Senate Report interpretation lest it become nothing more than a recycled version of the law Congress specifically intended to rescind with the broad disclosure provisions of FOIA.

II. The Ninth Circuit's expansion of the "High 2" exemption to FOIA will substantially hinder journalists' ability to serve their constitutionally protected "watchdog" function and ensure hazardous materials and critical infrastructure are being properly maintained.

The continual expansion of Exemption 2 is a severe impediment to journalists (as well as various public interest stakeholders) who depend on FOIA to enable their "watchdog" function of monitoring government facilities and activities that put the public at risk. What follows are examples of how journalists and community organizations have effectively used the types of records at issue for the public good that the lower court's expansion of Exemption 2 could make exempt—namely records related to chemical facilities, transportation infrastructure, nuclear weapons and biological agents.

A. Hazardous Chemical Records

In January 2007, Carl Prine, a reporter for the *Pittsburgh Tribune-Review* and a former U.S. Marine who served in Operation Iraqi Freedom, used records obtained under FOIA to aid in uncovering massive nationwide security lapses along rail lines and at facilities where hazardous chemicals are stored. *See* Carl Prine, *Terror on the Tracks*, Pittsburgh Tribune-Review, Jan 14, 2007.[5] Prine primarily relied on records obtained from the Federal Railroad Administration that detailed failures in how railroads and chemical plants conducted counter-terrorism and worker training. *See id.*

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[6] *Available at*: http://www.pittsburghlive.com/x/pittsburghtrib/news/specialreports/s_487117.html.

With the data on rail and chemical facilities in hand, Prine embarked on a national tour, eventually gaining access to 48 chemical plants along with rail lines that service such plants. *See id.* Prine was able to access hazardous material shipments or locomotives controlled by twelve rail lines. He was able to climb on trains, photograph derailing levers, look inside signal boxes and walk around hazmat train cars for an hour without ever being challenged by workers or police units that stood by idly. *See id.*

Prine used the deficiency reports he obtained from the government to investigate 12 facilities in the Atlanta, Georgia region. There he was again able to climb upon unguarded caches of lethal insecticides, flammable petroleum distillates and acetone, a chemical that can trigger vapor cloud explosions. *See id.* Prine found additional security lapses at a Marietta plant where he was able to access thousands of pounds of acrylic acid and railcars containing toluene diisocyanate, a chemical that will seek out the moisture of the human body and cause severe burns or death. *See id.*

Prine uncovered similar lapses in western states. Of the twenty three west coast railroads and chemical facilities listed in the deficiency reports, Prine was able to access eighteen. *See id.* Again Prine had ready access to caustic substances such as muriatic acid, fluorosilicic acid and ninety tons of deadly chlorine gas. *See id.* According to Environmental Protection Agency "Worst Case Scenario" documents Prine obtained through FOIA, a catastrophic chlorine gas attack at the plant in question could stretch as far as fourteen miles and threaten approximately 900,000 people. *See id.* Officials at that plant vowed to increase security patrols as a result of Prine's reporting. *See id.*

Similarly, upon hearing of Prine's travels in and around Las Vegas, the Nevada Homeland Security Commission opened an investigation into the safety of its chemical facilities. *See id.* "Closing gates, making sure workers and guards and police are aware of our chemicals, that's important," said Commission Supervisor Larry Casey. *Id.*

Mr. Prine's work has not gone unnoticed in Congress. In pushing for safety reforms on our nation's rails, Representative Edward J. Markey called Prine's 2007 expose a "scathing indictment of the state of rail security in our country." Press Release, Rep. Edward Markey, *House Committee Approves Markey Amendment to Re-Route Security-Sensitive Materials Around High Population and Urban Areas* (Mar. 13, 2007).[6] Prine's reporting was also cited in testimony before the U.S. House of Representatives regarding the failure to adequately protect our nation's rails. *See Rail and Mass Transit Security: Industry and Labor Perspectives Before H. SubComm. On Transportation Security and Infrastructure Protection*, 110th Cong. 6 (statement of John Murphy, Director, Teamster's Rail Conference).[7]

Had Prine not had access to government documents, it is uncertain whether any reform actions would have occurred to address ongoing haphazard security, often ignored by the very agencies ordered to safeguard them, that leaves large parts of America's industrial and transportation sectors vulnerable to attack.

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[6] *Available at*: http://markey.house.gov/index.php?option=com_content&task=view&id=2686&Itemid=141.

[7] *Available at*: http://homeland.house.gov/SiteDocuments/20070213174649-30260.pdf.

In a similar investigation, *The Washington Post* reviewed government hazardous materials response plans, which are public records, to determine the number of high-risk facilities in the Washington, D.C. metropolitan area and whether government officials were adequately prepared in the event of a disaster. It was discovered that 607 local facilities use thousands of pounds of "extremely hazardous" chemicals. *See* Stephen Fehr, *With Toxic Risk, Plans Vary; Some Localities Are More Ready Than Others to Deal With Major Hazard,* The Washington Post, Oct. 10, 1999 at C01.

The District of Columbia's emergency preparedness director at the time, Peter, G. LaPorte, told the *Washington Post* he ordered an overhaul of the city's response plan after he learned from a reporter that the then-current emergency response plan did not comply with federal regulations. *Id.*

In subsequent *Washington Post* reporting resulting from its initial investigation, reporters found that the emergency plan prepared by the city concluded that a 10-minute leak in one of the hoses that feeds chlorine from tankers to the wastewater treatment unit at Blue Plains Sewage Treatment Plant in Southwest Washington could spread a toxic plume of deadly chlorine one-third of a mile around the plant. In total, the plant housed between 180 and 630 tons of liquid chorine—enough to create a poisonous plume more than 30 miles long. *See* Eric Lipton, *Plant Warnings Go Unheeded; City Ignores Lapses in*

Handling Toxic Chemical at Blue Plains, The Washington Post, Nov. 5 1999 at A01.

Investigations further revealed that "the D.C. agency assigned to ensure worker safety at Blue Plains had found a range of serious safety violations in the plant's chlorine facility in 1996—and never conducted a second inspection to determine whether the problems had been corrected." *See* Eric Lipton, *Urgent Repairs Begin at D.C. Plant; Blue Plains Faces Investigations into Chlorine Safety,* Nov. 6, 1999 at A01.

Reporters also found that city documents showed that problems persisted with the plant's outdated chlorine leak sensors. Top officials at the Water and Sewer Authority told the newspaper that "they had been unaware of such safety lapses at Blue Plains before being asked about them by *The Post*." *See* Eric Lipton, *Plant Warnings Go Unheeded; City Ignores Lapses in Handling Toxic Chemical at Blue Plains,* The Washington Post, Nov. 5 1999 at A01.

As a result of these follow-up investigations, repairs began at the Blue Plains plant the day following *The Post's* story, including replacing four of the plant's seven chlorine leak sensors, adding new emergency breathing equipment, repairing the audible alarm system, and increasing plant security. *See* Eric Lipton, *Urgent Repairs Begin at D.C. Plant; Blue Plains Faces Investigations into Chlorine Safety,* Nov. 6, 1999 at A01.

The Water and Sewer Authority also announced a schedule for replacing the highly toxic liquid chlorine at the Blue Plains facility with a safer chemical while also installing a $2.6 million security system. *See* Linda Wheeler, *Blue Plains Details Safety Plans;*

Chemical to Replace Toxic Chlorine Sooner Than Expected, The Washington Post, March 3, 2000.

B. Transportation Infrastructure Records

Last year, *The Philadelphia Inquirer* reported that Amtrak inspection records revealed that 47.4 percent of its Philadelphia area bridges received marks of "poor" or worse, noting such defects as decaying stone walls, eroded support piers, deteriorated metal plates, worn girders and missing rivets. *See* Paul Nussbaum, *Amtrak Bridges in Region Troubled*, The Philadelphia Inquirer, Sept. 20, 2009, at A1. Amtrak only released the documents after the newspaper threatened to file a lawsuit to obtain the records. According to the newspaper, Amtrak refused to release the documents because, among other reasons, they were internal documents and terrorists could strike Amtrak bridges if they were to discover where bridges were most vulnerable. *See* Paul Nussbaum, *Lawsuit Threat Got Amtrak to Disclose*, The Philadelphia Inquirer, Sept. 20, 2009, at A15.

The article was a wake-up call for lawmakers. Senator Arlen Specter immediately called upon Amtrak to explain how it would address the problems uncovered by the newspaper and upon the Obama administration to allocate federal stimulus package funds for repairs. *See* Paul Nussbaum, *Specter Seeks Funds to Fix Bridges*, The Philadelphia Inquirer, Sept. 22, 2009, at B1.

In 2003, Jonathan D. Salant, a reporter for The Associated Press, accessed federal transportation data to find that 28 percent of the nation's highway bridges are considered deficient, including more than two-thirds of the bridges in the District of Columbia—the highest percentage in the country *See*

Jonathan D. Salant, *28 Percent of U.S. Bridges Called Unsafe*, The Associated Press, July 8, 2003.[8]

In 2005, reporter Dani Dodge of the *Ventura County Star* in California also analyzed Federal Highway Administration data to find that "[t]wenty-eight of Ventura County's 485 bridges are considered 'structurally deficient'" and that "[b]ringing just 15 of those bridges up to standard would cost $50 million." Likewise, Dodge's analysis found that 71 of the county's bridges are "functionally obsolete." Transportation officials called the situation "a public safety issue." *See* Dani Dodge, *County's Aging Bridges at the Breaking Point: Transportation Chief Says Public Safety Could Be Jeopardized*, Ventura County Star, Feb. 20, 2005.[9]

Finally, following the collapse of the Interstate 35W bridge in Minneapolis in August 2007, that killed 13 people and wounded more than 100, the U.S. Department of Homeland Security—despite the critical importance of such records—responded by sending letters to state officials nationwide, cautioning against the public disclosure of any bridge records that might expose a structure's vulnerabilities to terrorists. *See* Scott Albright, *Safe and Secure?: In the Wake of the Minneapolis Bridge Collapse, Some States have Tightened Control of Inspection Records*

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[8] *Available at:* http://community.seattletimes.nwsource.com/archive/?date=20030708&slug=bridges08.

[9] *Available at:* http://www.vcstar.com/news/2005/feb/20/countys-aging-bridges-at-the-breaking-point/#ixzz0xRggN9Pa.

that Could Foretell the Next Disaster, The News Media & The Law, Vol. 31, No. 4, Fall 2007, at 4.[10]

While some states clamped down on access to full inspection reports, even those with more restrictive policies continued to allow access to—and affirmatively post on their state websites—the numerical rating system data accumulated by the Federal Highway Administration in a national database. *See id.* at 5.

Minnesota went further, however, with the state transportation department publicly disclosing detailed and annotated bridge inspection reports within weeks after the collapse, according to Dan Browning, a veteran reporter with the Minneapolis *Star Tribune* who covered the collapse. *See id.*

Jeanne Aamodt, a Minnesota transportation department spokeswoman at the time, stated that the near overwhelming volume of media and citizen requests, nationally and internationally, concerning the bridge collapse was a primary impetus leading to the agency's decision to make the bridge inspection reports available online. *See id.* at 6

Barbara Forsland, an attorney with the Minnesota state department of transportation who at the time acted as the agency's data practices compliance officer, said that in 2005 the agency reviewed all information in its control cognizant that the state public records laws, the Minnesota Government Data Practices Act, features exemptions related to homeland security. *See id.* Forsland worked with state engineers to determine which Minnesota bridges should be designated "highly critical" based on the bridge's likely uses and vulnerabilities in the event of a terrorist attack or similar emergency. *See id.*

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[10] *Available at:* http://www.rcfp.org/news/mag/31-4/cov-safeands.html.

Of the bridges that were dubbed "highly critical," Forsland said, only documents pertaining to access and connection characteristics of the bridges were deemed necessary to withhold from public disclosure. *See id.*

During the 2005 review of Minnesota transportation records focusing on homeland security issues, Forsland said the state determined that annotated bridge inspection reports would be unlikely to give terrorists any advantages they couldn't also gain from simply walking up to a bridge. *See id.*

"Because bridges are exposed structures, they are visible, and even an inexperienced person can physically observe the bridge's structure," Forsland said. *Id.* "So that's why we felt that we only needed to limit access to a few specific elements of the design." *Id.*

These examples represent only a handful of the wealth of reporting on bridge deficiencies throughout the country. Investigative Reporters and Editors, a nonprofit group that supports and protects the rights of investigative journalists, maintains a comprehensive list of investigative journalism stories from across the nation that have used public data to report on pervasive bridge infrastructure problems nationwide.[11]

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[11] *Available at*: http://www.ire.org/inthenews_archive/bridgecollapse.html.

C. Nuclear Facility Records

In 2008, the nonprofit organization Tri-Valley Communities Against a Radioactive Environment (Tri-Valley CAREs) used FOIA to request site plans for the proposed "modernization project" of the Lawrence Livermore National Laboratory Tritium Facility in Livermore, California, a national nuclear weapons development and research facility. In response, the laboratory produced redacted blueprints that Tri-Valley CAREs used in a public meeting to inform the public of the scale and scope of the increase in tritium at the facility.

The site plans were also used by the organization's guest public health specialists to analyze the public health impact posed by the facility and to develop Tri-Valley CAREs' public comment during the National Environmental Policy Act scoping process on the "Complex 2030 Programmatic Environmental Impact Statement," and used to develop the group's comment at the public hearing on that same statement. *Comments on the Final Complex Transformation SPEIS*, Tri-Valley CAREs , Nov. 21, 2008.[12]

In August, 2010, the Salt Lake City *Deseret News* obtained Air Force audit agency reports through FOIA showing that Utah's Hill Air Force Base failed to account for more than 100 nuclear-related parts during recent inventories, exposing the base to potential "undetected theft." *See Hill AFB's Handling of Nuke Items Criticized*, The Associated Press, Aug.

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[12] *Available at* http://www.trivalleycares.org/new/finalepeisletter.html.

10, 2010.[13] The unaccounted for nuclear weapon assets were valued at more than $2.6 million. *See id.* The report also indicated that "when Hill officials found discrepancies in inventory data, they simply changed codes on forms, without verifying actual conditions." *Id.* According to the obtained documents, inspectors also found "some nuclear-related items being stored in containers marked with codes for other parts, which could lead to shipping the wrong item." *Id.*

These findings were especially disturbing in light of a 2008 incident in which Hill Air Force Base officials mistakenly sent nuclear missile parts to Taiwan instead of helicopter batteries. As a result of the recent audit, Hill officials agreed to the auditors' recommendations to "improve training, rewrite procedures, rearrange warehousing to segregate nuclear-related items and instruct workers to be more vigilant in handling materials." *Id.*

Much like the Lawrence Livermore National Laboratory blueprints, the audit reports from Hill Air Force Base were redacted to protect national security concerns; specifically, the Air Force declined to identify exactly what type of nuclear weapons parts had been mishandled. However, under the Ninth Circuit's expansion of the "High 2" exemption, even the redacted audits deemed safe for release by the Air Force could arguably be withheld from public release.

D. Biological Agent Records

Tri-Valley CAREs has also used FOIA to request documents related to experiments with biological agents at the Lawrence Livermore National Laboratory. Through documents released under FOIA, it was revealed that the lab had been conducting unauthorized experiments in which scientists had been producing highly resistant strains of Yersinia pestis (commonly known as "plague") and anthrax in violation of the law. *See* Marylia Kelley, *Lab Caught Conducting Illegal Restricted Bio-Experiments,* Citizen's Watch Newsletter, Apr./May 2009.[14] Furthermore, the documents revealed that in 2005 five individuals were exposed to anthrax that highlighted a lack of adequate security and response procedures during the event. *See id.* The lab was ultimately fined $450,000 in relation to the incident. *See id.*

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[13] *Available at:* http://www.sltrib.com/sltrib/home/50071185-76/hill-nuclear-auditors-items.html.csp

But all of this may have never been uncovered had Tri-Valley not sued to enforce its FOIA rights and fight withholdings based on Exemption 2, among other exemptions. "The Dept. of Energy and the Lab withheld these documents until we filed federal litigation under FOIA to obtain them," said Kelley, who characterized the lawsuit as a "stunning example of the government covering up unclassified information because it is embarrassing." *Id.*

It is clear the types of documents the government claims should be shielded under a "High 2" exemption in this case contain the exact information the public needs to assess the dangers in their local communities and effect positive change. This Court cannot allow journalists and the public to be kept in the dark about such incredible potential risks.

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[14] *Available at*: http://www.trivalleycares.org/new/cwaprmay09.html.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court reverse the decision of the U.S. Court of Appeals for the Ninth Circuit and hold that FOIA's broad presumption of disclosure along with the narrow reading that must be given to its exemptions necessarily requires a strict construction of Exemption 2 paralleling the scope of the trivial matters outlined in the Senate Report.

Respectfully submitted,

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APPENDIX A

Descriptions of *amici*:

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

ALM Media, LLC publishes over thirty national and regional magazines and newspapers, including The American Lawyer, the New York Law Journal, Corporate Counsel, and the National Law Journal as well as the website Law.com. Many of ALM's publications have long histories reporting on legal issues and serving their local legal communities. ALM's The Recorder, for example, has been published in Northern California since 1877; the New York Law Journal was begun a few years later, in 1888. ALM's publications have won numerous awards for their coverage of critical national and local legal stories, including many stories that have been later picked up by other national media. ALM Media, LLC is privately owned, and no publicly held corporation owns 10 percent or more of its stock.

With some 500 members, The American Society of News Editors ("ASNE") is an organization that includes directing editors of daily newspapers throughout the Americas. ASNE changed its name in April 2009 to the American Society of News Editors and approved broadening its membership to editors of online news providers and academic leaders. Founded in 1922, as the American Society of Newspaper Editors, ASNE is active in a number of areas of interest to top editors with priorities on improving freedom of information, diversity, readership and the credibility of newspapers.

The Associated Press ("AP") is a global news agency organized as a mutual news cooperative under the New York Not-for-Profit Corporation Law. AP's members include approximately 1,500 daily newspapers and 25,000 broadcast news outlets throughout the United States. AP has its headquarters and main news operations in New York City and has staff in 321 locations worldwide. AP news reports in print and electronic formats of every kind, reaching a subscriber base that includes newspapers, broadcast stations, news networks and online information distributors in 116 countries.

Bloomberg L.P., based in New York City, operates Bloomberg News, which is comprised of more than 1,500 professionals in 145 bureaus around the world. Bloomberg News publishes more than 6,000 news stories each day, and The Bloomberg Professional Service maintains an archive of more than 15 million stories and multimedia reports and a photo library comprised of more than 290,000 images. Bloomberg News also operates as a wire service, syndicating news and data to over 450 newspapers worldwide with a combined circulation of 80 million people, in more than 160 countries. Bloomberg News operates cable and satellite television news channels broadcasting worldwide; WBBR, a 24-hour business news radio station which syndicates reports to more than 840 radio stations worldwide; Bloomberg Markets and Bloomberg BusinessWeek Magazines; and Bloomberg.com which receives 3.5 million individual user visits each month.

Cable News Network, Inc. ("CNN"), a division of Turner Broadcasting System, Inc., a Time Warner-Company, is the most trusted source for news and information. Its reach extends to nine cable and satellite television networks; one private place-based network; two radio networks; wireless devices around the world; CNN Digital Network, the No. 1 network of news Web sites in the United States; CNN Newsource, the world's most extensively syndicated news service; and strategic international partnerships within both television and the digital media.

The Citizen Media Law Project ("CMLP") provides legal assistance, education, and resources for individuals and organizations involved in online and citizen media. CMLP is jointly affiliated with Harvard University's Berkman Center for Internet & Society, a research center founded to explore cyberspace, share in its study, and help pioneer its development, and the Center for Citizen Media, an initiative to enhance and expand grassroots media. CMLP is an unincorporated association hosted at Harvard Law School, a non-profit educational institution.

Dow Jones & Company, Inc. is the publisher of The Wall Street Journal, a daily newspaper with a national circulation of over two million, WSJ.com, a news website with more than one million paid subscribers, Barron's, a weekly business and finance magazine, and through its Dow Jones Local Media Group, community newspapers throughout the United States. In addition, Dow Jones provides real-time financial news around the world through Dow Jones Newswires as well as news and other business and financial information through Dow Jones Factiva and Dow Jones Financial Information Services.

The E.W. Scripps Company is a diverse, 131-year-old media enterprise with interests in television stations, newspapers, local news and information Web sites, and licensing and syndication. The company's portfolio of locally-focused media properties includes: 10 TV stations (six ABC affiliates, three NBC affiliates and one independent); daily and community newspapers in 13 markets; and the Washington, D.C.-based Scripps Media Center, home of the Scripps Howard News Service.

The First Amendment Coalition is a non-profit public interest organization dedicated to defending free speech, free press, and open government rights in order to make government, at all levels, more accountable to the people. The Coalition's mission assumes that government transparency and an informed electorate are essential to a self-governing democracy. To that end, we resist excessive government secrecy (while recognizing the need to protect legitimate state secrets) and censorship of all kinds.

The First Amendment Project ("FAP") is a nonprofit organization based in Oakland, California, dedicated to protecting and promoting freedom of information, expression, and petition. FAP provides advice, educational materials, and legal representation to its core constituency of activists, journalists, and artists in service of these fundamental liberties.

The National Press Club is the world's leading professional organization for journalists. Founded in 1908, the Club has 3,500 members representing most major news organizations. The Club defends a free press worldwide. Each year, the Club holds over 2,000 events including news conferences, luncheons, and panels, and more than 250,000 guests come through its doors.

The National Press Photographers Association ("NPPA") is a non-profit organization dedicated to the advancement of photojournalism in its creation, editing and distribution. NPPA's almost 9,000 members include television and still photographers, editors, students and representatives of businesses that serve the photojournalism industry. Since 1946, the NPPA has vigorously promoted freedom of the press in all its forms, especially as that freedom relates to photojournalism.

Newspaper Association of America ("NAA") is a non-profit organization representing the interests of more than 2,000 newspapers in the United States and Canada. NAA members account for nearly 90 percent of the daily newspaper circulation in the United States and a wide range of non-daily newspapers. One of NAA's key priorities is to advance newspapers' First Amendment interests, including the ability to gather and report the news.

The Newspaper Guild - CWA is a labor organization representing more than 30,000 employees of newspapers, news magazines, news services and related media enterprises. Guild representation comprises, in the main, the advertising, business, circulation, editorial, maintenance and related departments of these media outlets. The Newspaper Guild is a sector of the Communications Workers of America. As America's largest communications and media union, representing over 700,000 men and women in both private and public sectors, CWA issues no stock and has no parent corporations.

NPR, Inc. is an award winning producer and distributor of noncommercial news programming. A privately supported, not-for-profit membership organization, NPR serves a growing audience of more than 26 million listeners each week by providing news programming to 285 member stations which are independently operated, noncommercial public radio stations. In addition, NPR provides original online content and audio streaming of its news programming. NPR.org offers hourly newscasts, special features and ten years of archived audio and information. NPR has no parent company and does not issue stock.

The Radio Television Digital News Association ("RTDNA") is the world's largest and only professional organization devoted exclusively to electronic journalism. RTDNA is made up of news directors, news associates, educators and students in radio, television, cable and electronic media in more than 30 countries. RTDNA is committed to encouraging excellence in the electronic journalism industry and upholding First Amendment freedoms.

The Society of Professional Journalists ("SPJ") is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry; works to inspire and educate the next generation of journalists; and protects First Amendment guarantees of freedom of speech and press.

Tribune Company operates broadcasting, publishing and interactive businesses, engaging in the coverage and dissemination of news and entertainment programming. On the broadcasting side, it owns 23 television stations, a radio station, a 24-hour regional cable news network and "Superstation" WGN America. On the publishing side, Tribune publishes eight daily newspapers -- Chicago Tribune, Hartford Courant, Los Angeles Times, Orlando Sentinel (Central Florida), The (Baltimore) Sun, The Daily Press (Hampton Roads, Virginia) The Morning Call (Allentown, Pa.), and South Florida Sun-Sentinel. Tribune Company is a privately held company.

The Washington Post is a leading newspaper with nationwide daily circulation of over 623,000 and a Sunday circulation of over 845,000.

APPENDIX B

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